NO. 2439.

IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

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FRANK M. PINDEL,

Petitioner,

vs.

NORMAN J. HOLGATE, as Trustee in Bankruptcy of the Estate of FRANK M. PINDEL, Bankrupt, and BANK OF NEZPERCE,

Respondent.

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IN THE MATTER OF FRANK M. PINDEL, BANKRUPT.

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## BRIEF OF RESPONDENTS.

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On Petition for Revision in Matters of Law of Orders of the United States District Court for the District of Idaho, Central Division.

IN BANKRUPTCY.

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FINIS BENTLEY,
of Lewiston, Idaho.
*Attorney for Norman J. Holgate, Trustee*, and
EUGENE O'NEILL
of Lewiston, Idaho,
*Attorney for Bank of Nezperce, Claimant.*

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# BRIEF OF RESPONDENTS NORMAN J. HOLGATE, TRUSTEE, and BANK OF NEZPERCE, CLAIMANT.

*Finis Bentley, attorney for the Trustee, Norman J. Holgate, and Eugene O'Neill, attorney for Bank of Nezperce, Claimant.*

This matter has been before this court prior hereto under the name of "Bank of Nezperce, et al., vs. Pindel, et ux. In re Pindel" and is reported in 193rd Federal Reporter at page 917 and following.

## STATEMENT OF FACTS.

Frank M. Pindel was declared a bankrupt on February 14, 1910. The Trustee, Norman J. Holgate, was appointed as such October 7, 1910. In the case reported in 193rd Fed. Rep., at 917, the wife of the bankrupt, Sarah E. Pindel, was party. A large amount of testimony was taken, involving all the possible issues that could come up in the case. The matter was presented to the District Judge, and decision rendered on the 20th day of May, 1911. These facts appear in the aforesaid cause in this court. In that case the question of the ownership, and whether exempt or not from sale for Bankrupt's debts, was brought for determination on review by this court, as to certain personal property and as to the real estate, consisting of lots numbered 1, 2, 3, and 4 of section 34, and lots numbered 29, 30, 31 and 32 of section 27, in township 34 north of range one west of Boise Meridian, then in Nez Perce, now in Lewis county, Idaho, containing 160 acres. (Page 919 of said decision). In the examination of that case before the referee, a large amount of evidence was taken covering all questions involved in this case, though not specifically plead. The amount paid by the trustee for taking the testimony therein can be determined by

taking the charges for one-half thereof, shown in lines 6 and 11 of page 79, Transcript in this case.

In the case reported in 193rd Fed. Rep. 917, in opposition to the claim of the Bankrupt and his wife, that the land was worth only $5000 and if worth more than $5000 it had been segregated by a competent court—one piece of the value of $5000 and the balance some $1500. It was determined that the decision of the District Court must be sustained finding that the value of the real estate was $9000, that it had not been segregated by any state court, and that Bankrupt and his wife should have thirty (30) days in which to pay the sum of $4000 to the Trustee and thereby secure to themselves the land involved in the homestead, the same discharged entirely from further liability to creditors. In the event of the $4000 not being paid (see page 920 of said Decision) "the Trustee is authorized to take the necessary steps and sell, in the manner provided by law, and under the direction of the referee in bankruptcy, the entire tract, for not less, however, than the sum of $5000, and that out of the proceeds of such sale the Trustee pay to the Bankrupt and to his wife, Sarah E. Pindel, the sum of $5000 and account for the balance, if any, of such proceeds as a part of the assets of the estate to be distributed in due course of administra-

tion. This decision was rendered by this Honorable Court February 13, 1912.

After waiting a further thirty days, giving the bankrupt and his wife full opportunity after the closing of the litigation to pay the $4000, the Trustee sought to obtain from the Referee an order of sale of said real estate, and after seeking for the period of some six months, obtained such order on March 1st, 1913, (Transcript of Record p. 71). The order recited notice to creditors of at least ten days given of the sale of the land described in the petition. That at a meeting of the creditors so called a "majority of the creditors and a majority in the amount of claims represented voted to sell the said land" (Transcript of Record p. 69). Petition for order of sale of real estate set out (Transcript of Record p. 81). Sale of said real estate was made under said order April 5, 1913, at Nezperce, the County Seat of Lewis County, in front of the place where the District Court was in session, or had last been in session, in said county, (Transcript of Record p. 83). The land was sold an April 5th, 1913, after due notice published and posted, for the sum of $10,500, to Orville M. Collins, he being the highest and best bidder; and he then paid on said purchase price the sum of $1050 of the purchase price, pursuant to the terms of the sale

announced in the notice. (Transcript of Record p. 83 and 84). Return of sale was immediately prepared and in the absence of the Referee from the District, was not filed until immediately after his return on April 23, 1913. The return of said sale is found in the Transcript of Record pages 73 to 85 inclusive, setting forth a full statement of the Trustee's proceedings and including an account of costs and expenses involved in the Trustee's handling of said estate to that time. The return shows that said sale was legally made and fairly conducted. So found by the Hon. District Court (Transcript of Record line 12 p. 48). The Trustee asked, in said Return that the sale be confirmed and that his expenses aforesaid, incurred in determining the right to sell the land, including the costs in the Circuit Court of Appeals on Review, be settled in this proceeding. In the previous case in this court as reported in 193rd Fed. Rep., p. 917, costs were allowed in favor of the respondent and cross-petitioner, Norman J. Holgate, as Trustee of the Estate of Frank M. Pindel, and against the petitioners and cross-respondents, Frank M. Pindel and Sarah E. Pindel, his wife 193 Fed. 924, which costs were taxed in the sum of $285.70 (Transcript of Record p. 80.)

To this return the bankrupt caused to be filed objections upon information, setting forth that the purchaser had not paid in the money, ten per cent of the purchase price, and particularly urglng that there might be a paying out by the bankrupt thus saving a sale of the real estate; also containing a general attack on the Trustee for taking possession of the property, censuring the Trustee's activity for wanting to get something accomplished for the estate, and objecting to the items of the account presented for the consideration of the Court. He also claimed there was nothing due the Creditor, Bank of Nezperce, and claimed damages for the taking of the property of Sarah E. Pindel. He also asked that the objections to the claim of Bank of Nezperce be heard at the same time with the question of confirmation of sale. These objections and request for hearing together were not noticed, not even mentionen until the time of hearing. This hearing was brought on the insistence of the Trustee that a hearing should be speedily had. Answers were then prepared, filed and served, both by the Trustee and Bank of Nezperce. The answer of the Trustee denied the wrongful taking of personal property, by him of Sarah E. Pindel at the time of qualifying, October 7, 1910, alleging that at the time he asked the Bankrupt

what exemptions he claimed, and was informed none were claimed, and alleging that exemptions were set apart by the Trustee to the Bankrupt at that time, and alleged the amending thereafter (in December, 1910) of the Bankrupt's schedule as to exempt property; alleged the intervening in the case of Sarah E. Pindel and the decision of the Hon. District Judge. He alleged the filing of petition for review of that decision in the Circuit Court of Appeals, and that during said litigation the Trustee had actual possession of the personal property; that he was obliged to employ a keeper to maintain possession of the property and protect the interests of the Creditors, and alleged that the Bankrupt had been, during the years 1911 and 1912, in possession of the real estate, describing it as above. He alleged the Bankrupt had the crops of 1911 and 1912 and all the proceeds thereof: that he had made no accounting of said proceeds, either to the Trustee or to the Referee, and that Bankrupt had not paid over to the Trustee *anything whatever* for the use of the real estate; that he had made no accounting whatever to the Trustee for the proceeds of the real estate, and that he refused, *upon demand, to make any accounting of or to surrender possession* of the real estate, and that he was *entering into an extended litigation for the sole pur-*

*pose of maintaining possession of the said real estate and obtaining the crops then growing thereon for the year* 1913. And the Trustee petitioned the Referee, the Hon. District Court aforesaid, that an order be made immediately confirming the sale of the said real estate and placing the purchaser thereof in possession, and in event that the said confirmation is denied or delayed that the said Bankrupt, Frank M. Pindel, be required to surrender possession of the said real estate to the said Trustee and to account for the proceeds of the said real estate for the years 1911 and 1912, and to pay to the said Trustee the proceeds thereof, less a reasonable sum for the care and labor expended by the Bankrupt in caring for and handling crops and caring for the real estate. The claimant Bank of Nezperce also filed a reply to the answer of the Bankrupt to the claim of Bank of Nezperce. In its reply, Bank of Nezperce admitted obtaining a judgment on February 15, 1909, against both Frank M. and Sarah E. Pindel, based upon the verdict of a jury in the District Court of the Second Judicial District of the State of Idaho, in and for Nez Perce County, the judgment being for the sum of $3635.16 and $1747.12 costs, which included keeper's fees and harvesting and hauling expenses and from which no

appeal was ever taken, it admitting the attachment of the defendant's property, the dissolution of the first attachment and the property being at once re-attached and held until after judgment. That upon the execution issued thereon all the property was sold except the real estate. Denied all injury to Sarah E. Pindel and the Bankrupt, or that they were in any way injured or damaged by any levy or detention of any property, or any use or services of any attached property; denied all damage to growing crops, or that they were not harvested at the proper time. Denied that by reason of any neglect or carelessness of plaintiff in said action or of the sheriff, or any wrongful or unlawful attachment whatever, or seizure, the Creditor damaged the Bankrupt or his wife in any sum whatever. Denied that the property, when attached or seized, was of the value of $5000, or any other greater value than what it brought on execution sale thereafter, viz., $2030.39 less the costs of the execution sale, $124.14, and the costs in the suit, $1747.12, including keeper's fees, harvesting and grain hauling expenses; and denied that by any seizure, or detention, or neglect in the care or keeping of the property, in the cutting or harvesting of the crops at the proper time, the said Bank depreciated the value of the property; and denied that the use

or depreciation of the same was the sum of $3000 or any other sum whatever;

Claimant Bank of Nezperce alleged that at no time in the said District Court did the defendant set up any counter claim or cross-complaint, or claimed any damages in said litigation. Denied that the Bank pretended to but averred that it actually sold the attached personal property on execution duly issued out of the court on the judgment of said District Court, and that it was all regularly sold after due notice and that the defendant's wife, Sarah E. Pindel, was present and took part in the bidding in the sale of the property; denied that, at the sale of the property, it was purchased by an officer of the Bank or that nothing hardly whatever was paid for the same; denied that the trustee, at the instance or request of the Bank of Nezperce, took possession of the individual or separate property of Sarah E. Pindel, or held possession of the same for a period of nine months, or deprived the said Sarah E. Pindel of the use of said property at a damage of $200 or to her damage in any sum whatever. Denied that there was due to Bankrupt or said Sarah E. Pindel from the Bank the sum of $5200, or any other sum whatever. Denied that any sum should be set off against said creditor's, Bank of Nezperce's judgment secur-

ed against them in said District Court, and denied that evidently or at all Judge Dietrich made, rendered or entered the order requiring $4000 to be paid in cash under the mistaken idea that the allowed claims against the estate amounted to $4000 or more, and asked that a speedy decision as to the amount due on its claim be made and the estate now pending unsettled for so long a time be closed and the Creditors receive the money so long theirs and unpaid. The paper to which this answer was filed with the Referee was not served until the time of the hearing, which commenced on the afternoon of June 14, 1913.

The papers constituting these issues have not been brought up by the Bankrupt for the consideration of this Court, and are therefore not referred to as contained in the Transcript.

This hearing was proceeded with. All manner of evidence was introduced, making a record of 654 typewritten pages, and taken directly into a typewriter by one D. E. Wolgemott,. The Bankrupt refused to have the testimony taken by a competent stenographer, and the cause was proceeded with for more than twenty days, with certain necessary interruptions, confirming at once the allegations in the Trustee's said answer that the Bankrupt was entering into an *extended litigation* for the *sole purpose*

of *retaining possession* of the real estate and *obtaining the crop* then growing thereon, *for the year* 1913. Moreover, the typewriter, said Wolgemott, in his dealing in the matter, is shown forth in the decision of the District Judge at pages 86, 87 and 88 of the Transcript of Record. Out of this vast amount of material, so brought into the record, the petitioner for review has brought up only about ten pages of printed matter, some 9½ pages of typewritten matter, further *confirming* the said statement of the Trustee in his answer to objections of confirmation of sale. After the preparation of briefs the case was submitted to the Referee and, after long delay, the Trustee and Claimant, Bank of Nez Perce requested the District Judge to take action in the matter, obtaining a communication from His Honor, Judge Dietrich, directing that the Referee show cause why he should not render a decision in that matter within a limited time stated.

A decision was rendered by the referee a year and a week after the sale of the real estate (see Transcript of Record, pages 19-35, inc.), and from this decision by the Referee both the Trustee, Norman J. Holgate, and the Claimant Bank of Nezperce, petitioned for a review by the said judge of this Court,

which review was granted. (Transcript of Record, pages 17 and 18).

Thereafter the cause was brought on regularly for hearing before the District Judge, Hon. Frank S. Dietrich, and decision in review rendered in the cause. The said judge had before him the entire record as the same was filed with the Referee, including petition for order directing Trustee to sell property, (Transcript of Record, pages 81 and 82); order of sale, (Transcript of Record pages 69, 70); affidavit as to order of sale by Norman J. Holgate, (Transcript of Record, pages 70, 71, 72); return of sale of real estate, (Transcript of Record pages 73-81); and notice of sale, (Transcript of Record pages 83 and 84); and statement of the publication in the Nez Perce Herald of notice of sale; (Transcript of Record, page 85).

A hearing was held in the District Court, after due notice given, Ben F. Tweedy, Esq., appearing for the Bankrupt, Finis Bentley, Esq., appearing for the Trustee, and Eugene O'Neill, Esq., appearing for the Claimant Bank of Nezperce; and thereafter the Court rendered its decision in said cause, and filed its opinion upon the various matters involved in said hearing, (Transcript of Record, pp. 35-53, inc.), in which the Honorable District Court rendered a de-

cision reversing the decision of the Referee with reference to the claim of Bank of Nezperce, allowing the same; with reference to confirmation of sale confirming the sale; with reference to the order confirming sale of real estate, granting to the Bankrupt and his wife Sarah E. Pindel the privilege of paying in, within 35 days from the date of decision, $5500.00 with interest thereon at the rate of 7 per cent per annum, from April 5, 1913 (the date of the sale) until paid, and thereby securing, on the payment of the said sum to the Trustee in Bankruptcy of said Estate, the right to the Bankrupt and wife to retain the land in question in this case, free from further claims of the Trustee, and to be the homestead of the Bankrupt and his wife, to-wit: Lots numbered one (1), two (2), three (3) and four (4), in section 34, and lots 29, 30, 31 and 32 in Section 27, Township 34 north of range one, west of Boise meridian—One hundred and sixty (160) acres now in Lewis County, State of Idaho. (Transcript of Record, pages 51, 52, inc.). Said decision was filed and dated June 3, 1914.

Thereafter the Bankrupt by his counsel gave notice of application for review to this the Circuit Court of Appeals, Ninth Circuit of the United States, at San Francisco, California, of the decision of the Honorable District Court, and has filed his

petition for revision and transcript of record, together with additional transcript of record in the cause, and his brief to which answer is now being made.

NOW REPLYING TO THAT BRIEF.

The facts set up therein are not conceded to be a true statement of the facts in this case. For that reason the respondents, the Trustee and Bank of Nezperce, combine in their answer to the Petitioner's brief and make the foregoing statement. They do not agree with the statement of facts as set forth in the brief of respondents; and further state, with reference to the facts in this case, that no evidence whatever was introduced, or any facts whatever shown in the course of the proceedings that indicated any wrongful acts on the part of the Trustee, or on the part of the Creditor, Bank of Nezperce; or any evidence showing any offset or counter-claim to the claim of Bank of Nezperce. Said claim is founded upon a judgment obtained on February 15, 1909, in the District Court of the Second Judicial District of Idaho, in and for Nez Perce County, for the sum of $3635.16 judgment, and $1747.12 costs, including keeper's fees, harvesting and hauling expenses, and on which there was paid only the sum of $1956.25,

and $131.50, precisely as shown by the decision of the Honorable Judge of the United States District Court, (Transcript of Record p. 36). The decision of the Referee in this case was anticipated by the respondents. The court was asked by the respondents, particularly the Claimant, Bank of Nezperce, that the case be taken away from him on account of his attitude as shown during and at the close of the hearing of the evidence in the cause, at Ilo, Idaho, and it was upon this application that the court directed that he should show cause why he should not render a decision therein; and the opinion of the Referee, as set forth in the Transcript of Record shows his attitude in this case and confirms the opinion of the respondents as to his attitude toward the Trustee and toward the Claimant, and speaks for itself as to why the Trustee and the Claimant, Bank of Nezperce, asked that the case be taken from him and why they have both applied for review of that decision.

Now in reply to aspersions and personal statements in Petitioner's brief, the respondents Trustee in Bankruptcy, and Claimant, Bank of Nezperce make a

## GENERAL REPLY TO STATEMENTS.

The Trustee has been such Trustee of the estate of the Bankrupt since his appointment, qualifying immediately on receiving appointment, and has continued to be diligent and careful with reference to all interests intrusted to him, and has spared no trouble or expense in preserving the property, as is shown by his return of sale (Transcript of Record, pages 77-80, inc.). He has been put to much expense, has been obliged to pay out large sums of money and to even hunt up stock that has been taken from the possession of his keeper, to-wit, hogs under his charge, and for the keeping of which, on his bond, he was responsible. The bankrupt selling the same and without notice to the Trustee causing expense in looking up the property. (Transcript of Record line 15 p. 78). He is now, for the second time, defending an action in the Circuit Court of Appeals, in each instance being obliged to have counsel, first in District Court, and then in this court in following out litigation. Transcripts of the records have been taken, for which he has been obliged to pay; in the previous case (Transcript of Record lines 6 and 12, page 79) stenographer's fees in the sum of $88.45, besides fees of witnesses, as shown in Transcript of Record, pages 78 and 79; and in costs in the previous

case in this court, a sum of $285.70 allowed him on February 15, 1912, (Transcript of Record p. 80) ; and in this part of the case Bank of Nezperce had to pay the sum of $145.00, one-half for the taking and typewriting of the evidence before the Referee at Ilo, Idaho, between June 14th and August 8, 1913, (Transcript of Record pages 86-88). All facts moreover necessary for the Referee to decide on the claim of Bank of Nezperce were taken and paid for in the taking of the testimony before the Referee at that time, December 30, 1910, and February 24, 1911, costing the Trustee said $88.45 (Transcript of Record lines 6 and 12 p. 79).

The claim of Bank of Nezperce, the other respondent, herein, rests upon said judgment obtained on the 15th day of February, 1909. In that case the action was commenced on June 27th, 1908, and an attachment was issued which was dissolved on or about August 13, 1908, but the property then held was immediately re-attached, held and sold on execution, except that part for which $131.50 was mentioned, was sold under an order directing the sale of attached property, and the balance on or about April 6. 1909, upon execution sale, by the ex-sheriff, who had *attached the property during his term of office and held the same up to that time.* In his return he in-

cluded some $57 for hogs sold by Sarah E. Pendel after the attachment, and the money paid to the sheriff. The balance constitutes the claim of Bank of Nezperce which the Bankrupt scheduled in his petition for bankruptcy at the sum of $3427.93 the claim filed being for the sum of $3912.14 and now allowed by the court in the sum of $3426.03; )Transcript of Record, pages 36 and 37). This claim was recognized by the Bankrupt and his wife in the previous proceedings before this court as a valid and existing claim against the Bankrupt's estate and the hearing in that case proceeded on that basis, (Vol. 193 Fed. Rep., 917 and following), and upon this claim nothing whatever has been paid. Moreover, not one cent has ever been paid to the Trustee by the Bankrupt in this case, all the large expenses involved in the extended litigation having been met by the Trustee aided by Creditors—not one cent paid by the Bankrupt who, however, has been in possession of the lands which he inventoried as the real estate of his estate, holding them as though exempt during the entire period. He has made no returns whatever and retained all the income which, according to the statement contained in the Referee's decision, as to the value of the crop for 1908 would amount to a *very large* sum during the five seasons that he has re-

tained such possession, staving off the day of settlement by litigations either by himself and wife or by himself. And the debt for claim thus resisted is a joint debt of both the Bankrupt and of the said Sarah E. Pindel. (Additional Transcript of Record, middle of page 5). So it appears that all this litigation by Sarah E. Pindel and by the Bankrupt was a litigation prosecuted solely for the purpose of avoiding a payment for which both were liable. It shows the bad faith of both the Bankrupt and his wife, in the entire proceedings in this suit and in all the bankruptcy proceedings.

## REVIEW OF PETITIONER'S BRIEF.

It is due to the Court from Respondents, to give it such aid as it can in understanding the true situation in the case, and in so doing it becomes necessary, as briefly as possible, to call attention to certain things stated in Petitioner's brief. These might be misleading if attention were not called to them. We will endeavor, in criticising this brief, to go as directly as possible to the points involved without seeking to examine them in the sometimes apparently duplicated statements.

Page 2, line 6, the value of the land was found to be $9,000 by the Honorable

Judge in his decision of May 20, 1910. There is nothing to show that the value of the land was ever less than that, from date of adjudication of bankruptcy, February 14, 1910, and it is immaterial what its value was at any of these times, excepting the 5th of April, 1913, when it sold for $10,500 at a sale regularly made and where competition for the property was free and open. Bank of Nezperce would have a right to question the condition of the Bankrupt's estate at the first meeting of creditors. It would be presumed that it did, with a claim of the size it later filed. The statement contained in lines 13, 14 and 15, page 4 of Brief, should be compared with the statement of the Bankrupt at the time of filing his petition, that he owed $3427.93 (Trans. of Record line 30 p. 36) and if the position of the Bankrupt as set forth following those lines on that page 4 of brief, it is true, then his whole purpose in becoming a bankrupt was to wrong and defraud Bank of Nez Perce, when, in his petition he says that he honestly owed the Bank the sum mentioned last above. The consistency of these statements is questioned if the truthfulness of the Bankrupt is not challenged thereby. The Referee—and we say here that it is not for the purpose of criticising the referee but for the purpose of show-

ing, as indicated, commencing line 5, page 5, and in the statement at lines 9 and 10 of page 6 of brief referred to as samples — the Referee seems to have completely fallen into the line of thought indicated by the counsel on the other side of the case; and this is stated with all deference to the Court and all departments thereof, believing that the safety of the country in all its best relations and interests of its people rests upon the respect entertained for our courts. It appears that at line 5, page 5 of brief, the Referee is forgetting for the moment at least his solemnly signed statement in the order for sale of the real estate, in which he plainly says (commencing at line 10 of page 69 Transcript of Record) that notice of at least ten days had been given to creditors, of the sale of the land, and the creditors voted to sell the land. No record or showing to the contrary was introduced. But he said nothing else with reference to that matter, and nothing is shown that any parties to the litigation were acting against the Bankrupt. The record itself shows, in its entirety, that the Bankrupt had been, at the time of the hearing at Ilo, Idaho, more than four years litigating creditors and the Trustee and paying nothing toward

the settlement of the estate. The aspersions against the attorney for the claimant, and the reappearance of these aspersions through the decision of the Referee and argument of Bankrupt's counsel suggests that the Petitioner's counsel regards this as somewhat of a criminal case and in defending his client it is necessary to abuse others in detracting attention from his own client. There is nothing in the Record, as shown at line 19 and following (p. 13 of brief), and lines 10 and following (p. 31 of petitioner's brief) indicating that counsel for claimant had anything to do with the seizing of personal proerty. The record shows that Finis Bentley, Esq., has been the attorney for the Trustee in these proceedings. At line 10, page 14, said brief, the attorney certainly cannot have referred to the Record (Trans. of Rec., page 81, 82) where nothing appears but the signature of the Trustee himself, and he has certainly shown in this continued contest that he is a man of some individuality and energy of his own. So all other statements with reference to counsel for claimant, are unfounded. Line 11 and following of page 7 of Brief must certainly be a misprint, for the sheriff had no business to, and never did find the value of the attached property except in selling it; and at lines 3 and 4, page 8, as well

as in lines 15, page 14, to line 12, inc., of page 15 of Brief, are set forth statements with which the Referee had nothing whatever to do, and, as shown in the affirmative part of our brief, it is irrelevant, immaterial and incompetent to be taken into consideration by the Referee.

Nothing in the Record shows that the Bank of Nezperce has gone out of business; and if it has, and we concede that it has and that Mr. Collins is back of it, he is back of it for the usual purposes involved in the honest closing of banks—to pay in full the depositors, and should receive unquestionable moneys loaned to patrons of the bank for use for business purposes. And had the Pindels had more honesty and less rascality the disgraceful statements, all made by his own counsel of his being in and pardoned out of the Idaho Penitentiary, would not appear so frequently in this record.

The record before the lower court, which the Bankrupt has not seen fit to bring up shows that this money, borrowed of the Bank, was invested in cattle, and the money was received from the Bank until it attained the large sum of $2950, before a note was asked for; and that when Mrs. Pindel sold the cattle she received $3831 for them, some of which, at least were purchased with this $2950, and that she paid

not one cent upon the Bank's claim, claiming that that amount would not more than pay her for her individual interest in the stock. At the same time, the judgment against her, based upon her own and the Bankrupt's said note, is a joint judgment against both of them, and all her litigation in this court in this portion of the case and that indicated at page 917 of 193rd Federal Reporter, was an effort to save herself from paying her own debt owed by her jointly with the Bankrupt to Bank of Nezperce and on which its claim is founded. These facts were all before the Referee and the same briefs were before him that were submitted to the Honorable District Judge, and the Referee must have been oblivious of the facts and the law or else in some way unduly influenced by the Bankrupt or Bankrupt's counsel, or some of these points would have been recognized by him in rendering his decision.

## THE FACTS AND THE LAW IN PETITIONER'S BRIEF.

The statements in the brief (pages 29-39) by Bankrupt's counsel need only passing notice to show their lack of foundation. In speaking of a conversation with Mr. Dowd (page 29), and of a conversation with Mr. Collins (page 31, line 6) and also in speaking

of the letter of the Honorable District Judge (Petitioner's brief, p. 30) the Bankrupt's counsel seeks to put special interpretations upon all those matters; but the one thing necessary to show, before the Bankrupt is entitled to any consideration in these matters, is lacking, to-wit: any statement that he at any time, or under any circumstances, has ever paid one cent towards the satisfaction of the claim of Bank of Nezperce. He doesn't approach either Mr. Dowd or Mr. Collins with the money and say "I am ready to pay that judgment or that debt," then on paying for it might ask to have the property back. The fact of the matter is, the Creditor has a right to execution. He has a right to press his claim for debt until he receives his money. The debtor has no right to complain of his insistence or energy; that is a right that is given by law, and the talk about being ready to pay, and about what people have done with his property, under valid process out of a court, is a waste of time on the part of the talker and is not deserving of attention at the hands of the listener. Until such payment of the claim is made, the Court is right in holding and assuming that there is an obligation to pay still existing. The holding-off of allowance of the claim of Bank of Nez Perce is a mere matter of negligence on the part of the Referee, with all due

deference to His Honor; and had the evidence before him gone up, it would appear that almost every claim but about three against the estate, with one exception—a claim disallowed, was allowed by him after June 14, 1913. Should this court desire evidence of these things, it will be furnished by further transcriptions from the evidence.

The Referee had no Authority to find with reference to the value of the property attached. As these respondents will show in their own part of this brief, all matters occurring prior to judgment must be brought in as cross-complaint or counter claim in that case; and nothing except the sale of the property—held that long period of time by Sarah E. Pindel resisting a sale under attachment and asking that the sale be made in the spring, is up for consideration, except the validity of the sale made by the sheriff who attached the property.

The assignment of errors (page 40 of the brief) simply indicates that a proper view of the facts and the law applicable to this case has not been presented to the Court. The statutes of the State of Idaho (set forth at pages 45, et seq.) are for the most part but not entirely correct in their setting forth. The comment upon the statutes is as to theory and, as to the application of those statutes, far-fetched and

misleading and the authorities are not in point. We will speak of a few of the authorities, and by omitting the others we are not conceding that they have any application to this case, but are not criticised because they have no application whatever to this case and for lack of time and space for discussing them.

Under the first point the point is immaterial in this case for the reason that the statements are bald generalities of statement. Bankrupt surrendered his property to the Trustee on becoming a bankrupt and thereby lost title to it and right of possession in law and should have long ago lost it in fact. The Trustee holds the title and right of possession and is to handle it for the benefit of the Creditors of the estate, and the Bankrupt must aid him with his knowledge on the lines indicated in the Statute, Bankruptcy Act. He is to receive his discharge from his debts, a valuable consideration, and in return is to aid the Trustee, not to put Bankrupt in a position to fight the Trustee and creditors, but to make the estate as valuable as possible for paying the claims of creditors. Bankrupt's counsel's theories on this line are wrong, and the acts of Bankrupt have throughout been worse than his counsel's theories. The Bankrupt has no set-off in this case, as we will

show in respondent's discussion of the law and facts of this case and the cases cited under this first head have no application to the points involved in this litigation.

The statements of Petitioner's counsel under "authority, under point 1," page 51, has no application to this case. Bank of Nezperce brought its suit in a state court on June 27, 1908. Judgment was rendered therein on February 15, 1909. Any counter-claim the bankrupt had must have been plead and adjudicated in that action. A mandatory judgment settles all controversies between the parties that have been, or could have been plead as a counter-claim or cross-complaint in that action. So we see that the authorities referred to would have no application to the facts in this case, and the filing of a claim based upon a judgment does not do away with the conclusiveness and binding effect of the judgment. A judgment is of full force and effect until reversed by a court having authority to modify or change the same, to-wit: the *court in which the judgment was obtained,* and it is immaterial about the question of the statute of limitations as to counter-claims, as there could be none against a valid and subsisting judgment rendered by a court of competent jurisdiction; and there

could be no set-off or counter-claim to such judgment, or the claim based thereon.

In Respondent's points in discussion of authorities we will discuss the proposition of there being no counter-claim that could possibly arise out of the proceedings in the case of Bank vs. Pindel, either under attachment or under execution in that case, or any off-set or counter-claim that could arise therefrom. And in reply to the statement at page 54 we will show that there could be no defense of reduction or recoupment arising out of the transactions in that case that was not litigated by cross-complaint or counter-claim in that action itself.

Page 55, any claim of payment claimed by the Bankrupt's estate must be a payment that is recognized in the law as such, and we will later show that nothing in the proceedings in the case of Bank of Nezperce vs. Pindel, in the state court or proceedings of the sheriff in that action, can have anything of interest for the consideration of this court; and to claim a judgment could be affected by any such matters when filed by the owner as a claim in bankruptcy is simply to absurdly maintain that a judgment has little, if any, binding force or effect upon the parties to the same. A judgment itself carries no burdens only to the person against whom it is taken is the theory of law.

Under Point "a"—While the bankruptcy court has the power to liquidate damages and to set them off against demands on contract, the premise of the statement is wanting when applied to this case. The Bankrupt has no damages, as we will show in Respondent's brief on the law and the facts. And, secondly, the Bank's claim does not rest upon contract but is reduced to judgment, an absolute verity. Hence, Point "a" has no application, or the authorities thereunder, to this case.

Point II, has no application to this case. There is no call for an appraisement of property. The opinion of Mrs. Pindel or of her neighbors as to the value of the property that the sheriff seized is immaterial. The value of the property seized is determined upon the execution sale. And with reference to the sheriff's transaction in this proceeding, we will show that *Bank of Nezperce* is in *no way responsible.* We do not believe this court will recognize as an absolute verity the statements of Mrs. Pindel as the *true* and *absolute* value of property seized by a sheriff nor consider that a judgment can be entered up in a bankruptcy cause against a valid judgment then four years old, and unreversed especially where those offsets are matters that must be liquidated in the *action in which the judgment is obtained.*. The prem-

ise of the Petitioner is wrong and the conclusion correspondingly so. The authorities are therefore not in point and we can have no application to the case at bar.

*Point III,* is in the same situation as the preceding point, resting upon a false premise. Nothing occurring, that *could be* set up as a counter-claim or cross-complaint in the case of Bank of Nezperce vs. Pindel, can be set up as a cross-complaint against the judgment (an absolute verity) of Bank of Nezperce. And, as will be shown in Respondent's affirmative brief and the proceedings, it will further be shown that claimant Bank of Nezperce is not responsible for or accountable to the Bankrupt *for the acts of the sheriff.* The claim for wrongful attachment of personal property will be dealt with directly in respondent's affirmative part of this brief; and therein will be shown that any authorities under this proposition, under Point II, have no application whatever and are irrelevant in consideration of the cause. Bankrupt's own authorities do not sustain either his theory or his contentions in the case. Quoting from *Ruthven vs. Beckwith* (Iowa, 45 N. W. 1073) cited by petitioner sustaining the 9th paragraph of the Syllabus, the Court says, at column 1, page 1075:

> "It being the duty of the sheriff to take rea-
> "sonable and ordinary care of the property,
> "damages resulting from a want of such care
> "are neither legal nor material consequences of
> "the attachment, but of the negligence of the
> "sheriff, *for which he, and not the plaintiff, is*
> *"liable."*

It will be noticed in that case, also, that the defendants (see statement of fact by the Court) were seeking damages by way of a counter-claim in the very action in which they were sued and in which the attachment issued. In the case of *Schofield vs. Territory* (9 N. M. 526, 56 Pac. 306) the action was upon the attachment bond after the attachment had been dismissed and the plaintiff in the action had ceased to proceed in his case upon the attachment. It was dismissed on the ground of the falsity of the affidavit as to removal of property from the Territory, and has no application here. In the case at bar there has been no action upon any bond, and the plaintiff, having started in to make the property of the defendants available for the satisfaction of a judgment, naturally proceeded to make it available. The defendants, knowing that plaintiff was right and within the limits of the law, raised no claim for damages by cross-complaint or counter-claim—evidently never thought of such a thing until, in their employment of numerous and various counsel, they

secured the services of their present attorney. *Miller vs. Baker,* (79 S. W. 187) appears to be an action upon an attachment bond. In the case at bar the property was not wrongfully attached, the first attachment being dismissed for a slight error in the typewriting of the bond.

In suing upon a bond for damages claimed for either the improper or negligent acts of the sheriff, no one would be reached but the *signers* of the bond, and Bank of Nezperce has signed no bond or undertaking whatever in the issuing of either attachment; consequently there is no cause of action, or occasion for action, against Bank of Nezperce, because these bonds are contracts and no person can be made liable only on the exact terms of a contract, and none but those who are parties thereto. Therefore, all the references here, as to holding Bank of Nezperce for any damages on account of the attachment, are first as stated above, not applicable to anything that occurred prior to the judgment, as all that must be brought by counter-claim or cross-complaint in the action itself, and determined in that action at the time of rendition of judgment or it is forever barred. Second, Bank of Nezperce is not responsible for the actions of the sheriff.

No property has been wasted, injured or destroyed, or ever mentioned as destroyed until the hearing upon this objection to the claim of Bank of Nezperce, showing that the spleen and enmity of the Bankrupt and his wife have been at all times, and still are, directed at the Bank of Nezperce, claimant herein, and that the sheriff in this instance is attacked (see p. 6, line 9 of Brief) merely on the ground of it being an excuse to harm or injure the claimant Bank of Nezperce. No action was ever brought against the Bank, and none could have been maintained, and the actions of the sheriff were performed in the summer of 1908 and the spring of 1909, showing that our conclusion that it was merely a pretext for holding up Bank of Nezperce is correct; for they had known at all times, and now know, that they have never had a cause of action against the sheriff and that the Bank of Nezperce is not responsible for the sheriff's acts, and the bonds on attachment have been on file at all times, upon which no action has ever been brought and none could be legally brought.

And any action that could be brought would have been long since barred by the statutes of limitations of the State of Idaho, to-wit, sections 4054 and 4055 in Subdivisions 1-3 and 1-2, respectively, Revised Codes of Idaho: Which portions read as follows:

"*Sec.* 4054. Within three years:

1. An action upon a liability created by statute other than a penalty or forfeiture;

2. An action for trespass upon real property;

3. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property."

"*Sec.* 4055. Within two years:

1. An action against a sheriff, coroner, or constable, upon the liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution;

"2. An action upon a statute for a penalty or forfeiture, where the action is given to an individual, or to an individual and the State, *except* when the statute imposing it prescribes a different limitation;"

Under *Point IV*, the United States District Court has in no way been technical, but has rendered its decision strictly in accordance with the facts and law involved, and has found all the issues of fact and of law properly. These points will be taken up more fully in Respondent's affirmative brief in this case.

At page 68 of Petitioner's brief the statements are based upon a wrong supposition. Frank M. Pindel could have filed counter-claim or cross-ocmplaint in

the original action of Bank of Nezperce vs. Frank M. Pindel, in the state court, and must do this in all matters that could be plead up to time of judgment in that action. Bank of Nezperce has not nor has the sheriff at any time been a tort feasor. The question of contribution between tort feasors, while his law may go to that point, has nothing to do with this case. The authorities cited on page 68 have no application and are a little misleading. His special reference of 4 Cyc., 2057e, applies only to advising directing or assisting the officer to seize property *not belonging to the debtor;* Both Bankrupt and wife were liable for that deb. (Additional Trans. of Record p. 4-6). All of those authorities are inapplicable in this case.

Either intentionally or unwittingly Bankrupt's counsel misconstrues the court's decision as to sections 4055 and 4054, Revised Codes. The Hon. District Judge commented upon the Bankrupt's listing the claim of Bank of Nezperce as a valid claim against his estate, never mentioning any offset until the hearing upon this contest of the claim, allowing the matter to pass through the hearing in the lower court and this court as a valid claim to be paid by his estate. See case of Bank of Nezperce et al. vs. F. M. Pindel (reported in 193rd Fed. Rep., 917), the

Court in discussing that (Transcript of Record, pages 38-39) properly holds that the Bankrupt has estopped himself from claiming that it is not now a valid judgment. Further his Hon. states, at line 18, p. 39, Trans. of Record: "A judgment is an adjudication, not only of all defenses actually interposed, but as well of all which might be interposed" a clear and concise statement on that point; and he further adds: "It is thought that not only by the representations made in the schedules, but by an order of May 20, 1911, the Bankrupt is estopped from setting up the counter-claims at this time." And, further, at line 17, p. 41, Trans. of Record, the Court says: "The theory of the law urged by counsel for the Bankrupt is that the defendant may maintain his action against the plaintiff for the negligence of the sheriff in executing the writ, and that the plaintiff's remedy, in turn, is against that officer and his bondsmen. But here the defendant, waits until any remedy which the Bank may have had against the sheriff is cut off by the statute of limitations, and then, for the first time, asserts his claim." And surely the Court is right in this proposition, in holding that it works an estoppel against the Bankrupt. And the Court further saying (same page): "As a further consideration it is to be observed that, upon his

appointment, these counter-claims vested in the Trustee; and it is apparent that if he had brought a plenary suit thereon against the Bank at the time they were first put forward, (June 14, 1913), by the Bankrupt in this proceeding, Section 4054, Subdivisions 3 and 4 of the Idaho Revised Codes, providing for a three-year period of limitations for actions for trespass upon real property, and for taking or injuring personal property, could have been successful pleaded in bar." Thus showing that again it would have been inequitable, unjust and unreasonable not to hold this Bankrupt estopped if there were anything in his contention. And thus it appears that Bankrupt's criticism of the Hon. District Judge upon the construction of 4055 and 4054 of the Revised Codes of Idaho is uncalled for, unjust and unreasonable and that it is not the proposition of the District Judge but the proposition of the counsel for Bankrupt (line 6, p 69 of brief), that is, the "new and strange proposition with no authority to support it."

The estate can have no credit (p. 69, Trans. of Record) for any $4333.50 for the reason that there is no premise on which to base such a theory. This will be discussed in our

own part of the brief. Any offset up to judgment must be asserted by counter-claim or cross-complaint in the original action, and the ex-sheriff that made the sale was the only person authorized to do so under the facts of the case. Further the time within which a bankrupt or a creditor can object to the amount of the claim is not involved in this matter, in the ordinary acceptance of that term. In this case there can be no objection to the validity of the judgment either here or in the court in which it was rendered. No proper application was ever made therein within the time limit for taking an appeal or for setting aside the same for fraud. So it has passed beyond the point where it can be challenged. Other than as mentioned above it is unnecessary to discuss the suspending of the statute of limitations, or the scheduling of unpaid debts (pages 69 and 70), the Bankrupt himself being estopped by the basis on which this claim rests, and estopped by his own act in reference to the same, to claim any invalidity or offsets against the claim of Bank of Nezperce, and it is in no way burdened by any offsets whatever and there can be no burden on it preventing its allowance. No valid objection has been or can be raised thereto. The Trustee would not have his attention called to any

action with reference to that judgment as long as the Bankrupt himself, by his acts, was indicating that it was valid and subsisting, which is among the elements that go to make up the estoppel of the Bankrupt as mentioned by the Hon. District Judge. It would devolve upon the Petitioner, who desires to argue the proposition to show by the Record that the Referee did not allow a claim when he received it, or when it was presented to him by the Bank, because objections had been made to its allowance. or that the Hon. Referee for"cause" had continued its consideration. There is nothing in the record to show that this claim has not been treated by the Honorable Referee like all the other claims with neglect, except some drummed up probably by Mrs. Pindel. Nearly all claims being allowed after the 14th of June, 1913,—more than two years after the time for presenting claims had expired—and this with all deference to the Honorable Referee. The record will be produced on that point if the court wishes it.

Line 18, page 73 of Petitioner's Brief: We will say that equity follows the law with reference to the offset there mentioned, and that where, under the law, the party has no offset, equity cannot follow out the proposition in allowing such.

Pages 74, 75, of the Petitioner's Brief: We are not surprised at the difficulties of the counsel to determine whether his defense to the allowance of the bank's claim was payment or off-set when the real point has nothing to do with either one. *Nothing has been paid upon the judgment,* and *nothing can be set off against it,* in this case, and it is a joint obligation of both the Bankrupt and his wife. The claim is based upon an absolute verity, the judgment of a competent court, and there is no claim whatever, anywhere, of the valid payment of the same, or a fact suggesting the propriety of such a claim.

*Point V* and the authorities (page 76 of Petitioner's Brief) rest upon a false premise. It is again the theory that there is nothing due from the Bankrupt and his wife, or either of them, to Bank of Nezperce. That a valid subsisting judgment of a competent state court can be made subject to set off in a bankruptcy court is a baseless theory.

As to his Point VI, (Petitioner's Brief, p. 77 et seq.). The decision of the Circuit Court of Appeals in the action of Bank of Nezperce vs. Pindel, in which Mrs. Pindel was a defendant, was notice to her as such; also, the decision of the District Judge of May 20, 1911, that her claim of the homestead being abso-

lutely exempt was not well taken, and that it would be sold for the payment of the debts; was ample notice to her that the land would be sold for payment of debts if a bid of over $5000 could be had. Further published notice had been given, creditors had met and had decided to sell, prior to the decision in that case; the Honorable District Judge had found that all parties in interest (Trans. of Rec. ps. 46-47, line 2) had participated in the proceedings bringing about this condition, and, further, the Referee himself (Trans. of Rec. p. 69, line 2) in his own order has found that at least a ten-days' notice to the creditors had been given, of the sale, and that at the meeting "a majority of the creditors and a majority in the amount of claims represented voted to sell the said land." These things were all notice to Mrs. Pindel, and it appears in the decision of the Hon. District Judge that (Trans. of Rec. p. 47, lines 3 and 4). "The Referee thus acquired jurisdiction to make the order, no creditor now appears to oppose confirmation and eight out of the eleven whose claims were filed have in writing expressed their aproval of the order; the three other claims are trivial in amount." Making the objection there set forth by the Petitioner's

counsel irrelevant and immaterial for any purpose or for the consideration of the court on any line.

For counsel to theorize (p. 79, et seq. of brief) on what Mrs. Pindel would do is quite useless. The Court himself suggests, at page 47, (Trans. of Record) that in the event of a new sale a higher bid possibly might be obtained and *assurance* given of good title, but "neither the Trustee nor the Court can furnish such a guarantee" (that the purchaser's title would be exempt from assault).

A mere inadequacy of consideration in sale of real estate is not ground for refusing to confirm the sale, Counsel's citation to *Loveland on Bankruptcy* (pp. 579-580) is from an old edition of that work copyrighted 1899, and the immediate further quotation from that author (top page 580) is as follows: "In cases where the sale has been set aside on account of inadequacy of price, there was such an inadequacy of price as to arouse a suspicion of fraud or collusion."

See Collier on Bankruptcy, 8th Ed., 1910, p. 836 where the author says: "Sales regularly and fairly made will not, as a rule, be disturbed on the ground of mere inadequacy of price, unless for fraud, or the stifling of bids, or the like" (citing authorities).

So the counsel is giving us antiquated misleading or partially stated law on an important proposition, in his case. And the further statement (on p. 80) that not one dollar of the $10,500 bid could have been ordered paid on the claim of the Bank so long as it was not allowed, is immaterial in this case. The purpose of the sale and the object of the Trustee was to secure the means of paying upon claims, and any that were not allowed would not receive their dividend at that time, and their allowance would be attended to—a matter of no consideration to the Bankrupt in this case. The Bank's claim was not pressed because all evidence necessary for its allowance had long since been given and paid for, and the matter was awaiting the action of the Referee, which action was never token. Finally a new objection was presented, making quite an excuse for the Bankrupt to secure the crop of hay upon the land in question for the year 1913, as alleged in the answer of the Trustee replying to complaint on objections to confirmation of sale.

Counsel's argument, pages 81—is without reason or premise as the Trustee has been seeking to get something done towards settling the Bankrupt's estate, and claimant Bank of Nezperce, with other creditors, has been seeking to get its money. We sub-

mit that, from February 14, 1910, to this time (nearly five years) is too long to be settling an estate, too long for a bank to go without a large sum of money, bringing no returns whatever while a Bankrupt has been allowed to be declared a bankrupt be discharged for two years and still hold onto and take the income from the property he surrendered to creditors. He has been twice graceously allowed by the court to pay fixed, reasonable sums and save the homestead, has failed to comply and now his counsel is urging unfounded, baseless suggestions of sharp practices to mislead the court as to the insincerity and dishonesty of this Bankrupt and his wife.

Bank of Nezperce's claim is now allowed. The requirement of 10 per cent of the purchase money at time of sale was reasonable and in harmony with sound business principles. The staving off of all proceedings by the Bankrupt and wife since the sale shows the absurdity of calling for a $10,500 cash payment of money that bankrupt urges could be paid on debts or homestead exemptions. It would have resulted in holding another large sum of money non-producing and idle. The dishonest, insincere and unworthy can see those qualities in others by reason of their possessing them themselves.

There is no evidence of the homestead increasing in value. The effort of Bankrupt and wife at first was (having failed to get the land set over as exempt in the Probate Court of Nez Perce County, Idaho) was (see line 44, et seq., page 919, 193 Federal Reporter) to get this court to set the land aside as a homestead worth only $5000. The Hon. United States District Court on evidence adduced on that point found it worth $9000 and decision was affirmed in this court (p. 924, 193 Fed. Rep.). On April 5th, 1913, the land sells at a sale, the Hon. United States District Court finds was legally made and fairly conducted, at $10,500, an exact test of its value, and we then find Bankrupt and wife urging that its value is now too great to allow the confirmation at that figure, and that purchaser Orville M. Collins must be seeking, as president of Claimant, to make $4000 or $5000 out of the purchase. Why the land if $10,500 is not its full value would not sell for more on a re-sale is pointed out by the Hon. District Court in its decision in this case, (Transcript of Record, p. 47, lower half.)

In this connection, Bank of Nezperce's counsel calls attention to what might have been brought up by the Petitioner and will be by Respondents if either questioned or desired. It was before the District

Court. That on April 6th, 1909, at the sale under execution, of the grain and stock, Mrs. Pindel cautioned the bystanders against bidding on the property, "chilled the bidding" and now asks the Hon. United States District Court and this court to award her and the Bankrupt the difference between what the property thus brought under execution sale, its presumptive real value, and the fabulous estimates of values of property presented by them to and found by the Referee. (Transcript of Record p. 23).

If the Referee (in all due deference to the court) and the Pindels and the typewriter, D. E. Wolgamott, are not"acting in harmony against"the Trustee and Bank of Nezperce the record is misleading. Said Wolgamott charges first $256.25 for this claimant's copy of the evidence taken at Ilo, Idaho, and then sues for $435.65 (Transcript of Record pp. 86-88). Then he holds the matter off until that record was not in respondent's hands until the time of sending Additional Transcript of Record under this Court's Rule was past. Respondent admits that the $145.00 at the time of the Court's decision could not be immediately advanced. Yet when the money was in hand he withheld the record for about a week before consenting to surrender it for the money. In the

meantime the date for furnishing additional transcript of record had passed.

As to page 82 and following of Petitioner's brief, the allowance of the claim of Bank of Nezperce is a mere matter of computing the Principal, Costs and Interest, less amount made under process. The Judgment Docket of the District Court is prima facie evidence of the amounts of the Judgment, Costs, amounts made and amounts unsatisfied. (Additional Transcript of Record, p. 7.) The Hon. District Court has computed the amount correctly finding the difference $3426.03, (Transcript of Record, pp. 36 and 37). The Bankrupt admitted it was $3427.93 in the schedule of his debts. That finding was made by the Hon. District Court with all the record evidence before him. (Transcript of Record pp. 36-37).

As to filing of claim. The filing date is Feb. 8, 1911. That was an amended claim and included interest, the judgment being entered February 15, 1909. The lower court has computed it properly and correctly, (Transcript of Record pp. 52 and 53), with provision for interest or withholding "pursuant to general rules of law and as the facts may warrant." The amended claim was filed before the hearing of the evidence passed upon in the order of May 20th, 1911, and decision of this court affirming it reported in 193 Fed. Rep. 917, and all facts pertaining to Bank

of Nezperce's claim were, as before stated, introduced in evidence in that hearing. The crops of 1913 supplied the motive for this part of the litigation.

The order of sale stating no terms (Petitioner's Brief p. 82) the presumption would be that the land would be paid for at the time sale would be confirmed, deed ordered and ready for delivery. The Trustee's requiring of ten per cent of the purchase money to be paid down was a wise provision.—It would tend to shut out irresponsible bids and would designate a purchaser that would most likely complete the payment of the purchase money, and would secure the Trustee in making good any deficiency on having to re-sell. It would shut out bidding of the property way above its value (Mrs. Pindel was, and expected to be a bidder at that sale not shown from the record). Such bidding would necessitate a new sale with nothing in hand to meet the difference between the previous and succeeding sale bid. If such a requirement would "chill the bidding" it would temper it to the extent of making the final bid reasonable, and make it enforceable.

Further the presentation to the court of the Trustee's account was proper and reasonable. Why for instance should the Bankrupt having real estate, consisting of two parts, an exempt $5000.00 part and an unexempt part, be permitted when the Trus-

tee in the start was ready and willing to, and asked to sell, and deliver $5000 in cash, or the entire property if it did not bring more than $5000 litigate the matter from that time through May 20th, 1911, and to this day, making the costs and expenses including $285.70 in this court, and expenses in this case all at the charge of the creditor's part of the land? Why under such circumstances should a Trustee pay over $5000 in cash to a party that by his wrongful, unjust and unreasonable conduct has caused creditors such delays, made such great costs, and actually keeps in possession of the creditor's interests in the lands, taking the issues and profitt thereof? Why should the Trustee pay this money over to the Bankrupt while he owes for contesting creditors for more than three years and a half actually keeping them out of their money when the money is due him as costs for a groundless litigation forced on by the Bankrupt, or by him and his wife? And as to Bank of Nezperce's claim it amounts to some 12-13ths of the claims and *both* the *Bankrupt* and *his wife* are *liable for its payment.* And it has so far met all costs. Why should the Trustee, or Bank of Nezperce hold judgments for costs, if awarded, while money is being paid over on confirmation of sale to the Bankrupt and wife from which such costs should be paid?

Should these people be adjudged to have litigated a false claim at the expense, or out of the moneys of the Trustee and creditors? or should it be out of the money that might be exempt, but which they can use as they see fit and have seen fit to litigate away? The Trustee's Account, Costs, Attorney fees and exemptions of real estate money we suggest should be settled in this proceeding at the earliest convenience of the court.

A sale is not complete until confirmation.

Point VII of Petitioner's Brief is denied in toto. It is fully analyzed and discussed in Petitioner's Brief under head of *Law of the Case* and following:

Point VIII. This proposition is so clearly analyzed by the Hon. District Court that reference is here made thereto. (Transcript of Record p. 43 line 17 including line 20 p. 44). The $3831.25 was received by Mrs. Pindel and she had disappeared without paying a cent on the indebtedness of the bank, was what precipitated the litigation. The letter of July 10, 1908, was a prtense at frankness. The sheriff saw Mrs. Pindel on July 10, 1908. As time went by he remembered of having *seen* her and as their acquaintance ripened he got down squarely to doing business without *seeing* her. Her "indefinite conditional proposition" ceased to operate satisfactorily.

REPLYING TO THE ARGUMENT OF RESPONDENT.

Petitioner's counsel and the Hon. Referee may not be bound by the interpretation given by the Supreme Court of the State to this state's statutes. The Hon. District Judge recognizes the binding effect of such interpretations on the United States courts. The point will be treated of later in Respondent's affirmative brief where the Willman vs. Friedman case, 4 Ida. 209, and other cases will be considered, and the interpretation of certain sections of the Code, (Petitioner's Brief pp. 88-90) will be considered. The case of Brosnan et al, vs. Kramer et al., (Cal.) 66 Pac. 979-981 has no application. It is a California case, the pleading showed no "Connection of the mortgage with the lease" so not allowed as a defense. Our Supreme Court has definitely decided against the permitting of a multiplicity of suits passing upon the same in cases precisely like the one at bar.

Page 91 of Brief—We reply there can be no set-offs between the parties to a valid subsisting judgment of a competent court, as to matters connected with the original litigation. This is elementary law. The point is discussed later by respondents.

Page 92 Petitioner's brief. The lower court's statement is clear. The court holds and rightly that

there was no *evidence* of damages under the *first* attachment. The second attachment was valid. The cases cited have no application to that situation. Such a situation is known as "a failure of proof" and needs no law.

His first citation is backed however only by New York citation of early date. While he overlooks or fails to cite the same page Sub. B under "Regular Process" (Cyc. p. 832) the text reads.

"It has been held in many cases that no action lies in the absence of express or implied statutory authority for injuries caused by the mere wrongful suing out of an attachment, but that to give a cause of action it is also essential that the process should have been sued out maliciously and without probable cause" note the numerous authorities sustaining the text under note 16.

The other authorities have no application to this case, are not in point.

Ruthven vs. Beckwith 45 Pacif. 1073 has been mentioned before and syllabus 9 called attention to with extract from decision to effect that damages resulting from a lack of ordinary care on part of sheriff holding properly were neither legal nor material consequences of the attachment. The rules claimed to exist by Petitioner's counsel (His Brief lower half

page 92 and page 93) are not rules at all in this case. The dameges if any must be brought in the form of pleaded cross-complaint, or counter-claims into the original case or are forever barred.

Petitioner's Brief page 94. The rule there claimed cannot be regarded as law. Bankrupt's counsel's statements on that page are not supported by his cited authorities. Slightly recapitulating we have already indicated that the bank's claim rests on a valid judgment of a competent court: that Bankrupt's claims for damages arising *prior to judgment* in that case—any damages for wrongful attachment, waste of property or other like claim must be brought in by counter-claim or cross complaint in the original case in the State Court or it is forever barred. That includes everything claimed or that would occur except the sale of the property by ex-sheriff Lydon on April 6th, 1909. Includes any question of damages for excessive levy in attaching in the original case. We might then pass this as fully replied to.

This page 94 however gives the court a clear view of the attitude finally assumed by the Hon. Referee in this case. A slight examination of the law and authorities announced on that page will reveal the groundlessness of the Referee's opinion in the case

and lack of foundation to Bankrupt's Counsel's claims.

The law is the embodiment or statement in abstract of sound business experience and good hard sense. It is absurd to consider that if some slight error occurs in the handling of an attachment the creditor loses all rights, his property, or debt is gone —that the creditor loses all. The debtor's obligation is extinguished without returns to his Creditor. The absurdity of such proportions are manifest in their statement.

Mr. John G. Carlisle editor of "Executions" in Cyc. in 17 Cyc. at page 1394 sub. "D Levy upon debtor's property as satisfaction—1 Personal property" says "It has often been said by different courts that a levy upon sufficient personal property is a satisfaction of the execution; but *it is safe to say that this is no where the law.* A number of early cases in this country demonstrate the absudity of such a doctrine." In foot note 43 p. 1395 (17 Cyc. the author says quoting from Peck vs. Tiffany, 2 N. Y. 451, 456. "*There are* some *old cases* in which dicta are found, that a levy upon sufficient personal property to satisfy an execution is a satisfaction, but that doctrine has long since been exploded" citing authority * * * * "They say a levy is a satisfaction of the debt; but

every book they cite, and every case they decide, show under what qualifications they speak. They all go back to Mountney v. Andrews, *Cro. Eliz.* 237." Then discussing the case the decision quoted continues, "I need not cite authorities to show that such a consequence would not follow. It would be absurd, and contrary to all practice" citing authoritiees,* * * * * *"The basis upon which this spurious doctrine rested* was said to be that by a lawful seizure the debtor lost his property in the goods and henceforth the remedy was against the *sheriff* if the creditor did not realize his debt" citing authorities.

In 23 Cyc. 1488 sub. b. "Levy unproductive or insufficient" the author says; "The presumption of satisfaction of a judgment from levy on personal property is rebutted by proof * * * * * * that the property levied on * * * * * * was insufficient to satisfy the judgment." Mr. Freeman on judgments sec. 475, p. 817 says: "None of the decisions assumes that a levy produces any absolute satisfaction" * * * * * p. 818 "It is apparent that the satisfaction, if such it may be called, produced by a levy on personal property is liable to be removed by a variety of circumstances." So we see the authorities cited by Petitioner's counsel by no means sustain his contention, and his theory of the grounds and principles he contends for rests

on false premises and the conclusions attempted to be drawn necessarily wrong. There is no evidence showing the value of the property levied on to be $6522.00. There is no showing that all property levied on was not sold but at Additional Transcript of Record, p. 7, is shown, deducting all payments, the difference between the total judgment and the amount realized from the property. (Transcript of Record line 25, p. 36). There was still due $3426.03 less $131.50, (see Transcript of Record line 21 p. 44) and line 18 et. seq. and p. 52) at which the court finds $3521.83, with "interest to be hereafter allowed on said total amount from said last mentioned date (Feb. 10, 1910) or withheld pursuant to general rules of law and as the facts may warrant." (Transcript of Record pp. 52 and 53).

It is pretty clear the District Judge saw the inconsistency of Bankrupt's counsel's position taken on page 94 of his Brief and the inconsistency and non-applicability of the legal principles he was urging.

Bankrupt's counsel urges upon this court a little of Mrs. Pindel's testimony (Bankrupt's Brief p. 96) to convince the court that Mrs. Pindel had a contract with Bank of Nezperce for her having and selling some property. It will be seen on reading these statements together that it all narrows down to the letter

set out at Transcript of Record pp. 55 and 56. Out of the record brought here is omitted of course, the objections of counsel to the testimony as to its being irrelevant, incompetent, immaterial and not the best evidence, heresay statements, or statements made by a party not under oath are all omitted. (Transcript of Record, line 22, p. 63). It appears "Harry Lydon" told her "he attached all the personal proerty." This is her remembrance after some five years instead of the sheriff's returns.

At line 12 p. 54 Transcript of Record, we are to infer Mr.O'Neill was not in a compromising mood when Mrs. Pindel visited him, however, she tells him what she *could* do. "He" (Mr. O'Neill) "said he would see Dowd." Then "after Mr. O'Neill had agreed to this settlement Mr. O'Neill asked me to write a letter to Mr. Dowd and tell him what I could do." (Transcript of Record line 19 p. 54). But why should Mr. O'Neill ask her to write and "tell Mr. Dowd what she could do?" and why should she write such a letter if there was a contract or agreement made by her with Mr. O'Neill? She says she wrote the letter. (Transcript of Record line 19 p. 55). The letter then would be the latest expression undoubtedly, and take the place of all previous talks. As it was going to Mr. Dowd it would be carefully prepared for Mr.

Dowd's future use and reference. Referring then to what she told Mr. O'Neill (line 25, p. 54 Transcript of Record). "I told Mr. O'Neill that I *could* give them 200 acres of standing crop and the hogs and cattle they had attached" she does say she gave the things, but adds: "And I would sell enough of the small teams to pay the note or Frank's account if I could." If she had an agreement why couldn't she? She says: "They accepted the offer." Then she doesn't state or indicate she delivered over the goods. We submit no agreement is revealed so far. Now referring to the letter—the final—written with care statement. (line 4 of letter page 55 Transcript of Record). She says: "I thought best to have them (the hogs) sold to save feed bills on them and if you are *willing to sell them* at a *fair* price and give *me* credit on the note do so." If there *was* an agreement what question could there be about being *willing* to sell, and the price would be fixed or left entirely to Mr. Dowd to sell for what he could get. She wanted credit given to her on the note. Also note the statement "Also you can have the 200 acres of crop if we can *agree* on the *price* of the crop." What *does* that expression mean if there *was* an agreement? Can there be a contract with nothing agreed to? Respondents think it unnecessary to pursue further the

*agreement* proposition of July 10th, 1908—urged so strenuously by the Bankrupt's very learned counsel. No agreement whatever exists out of or in the letter. The Hon. District Judge's findings thereon are correct, to-wit: "The letter is *wanting* in the *essential elements* of a *contract* and amounts to nothing more than an *indefinite conditional proposal.*" (Transcript of Record line 17 p. 44). In passing no agreement can be found in the testimony of Mr. O'Neill. (Transcript of Record p. 56). Mr. O'Neill respectfully suggests that the 4th word in line 23 p. 56 should be *she* not "we" the latter word being an error in the Typewriter's hearing or a misprint.

The Referee, finding that there was an agreement is palpable error. A baseless conclusion.

There being no agreement, the whole proposition it what the Hon. District Court has *truly* found an *indefinite, conditional proposal,* it is not necessary to take the time of the Court to further discuss andthing that might rest on such a baseless conclusion as an agreement made. If there is no premise to the matters discussed in the following pages on this point (pages 96-116) it would be an imposition upon the court, we conceive, to discuss or consider the various suppositions, serious difficulties and legal uncertainties that would drop into the United

States judicial system if there *were* an agreement that might be discussed. We will therefore leave those pages without further consideration. It could be of no value to this Court to discuss what might be if there was no premise on which an argument could possibly be founded, and from such unfounded arguments only wrong conclusions have been or can be drawn.

We next come to the only remaining point discussed in Petitioner's brief, to-wit, sale of property by the ex-sheriff, and briefly mentioning it here, for it is fully discussed in our affirmative part of the brief, we will state that Harry Lydon who sold the property on the 6th of April, 1909, *was* the ex-sheriff of Nez Perce county but was the duly qualified and acting sheriff of Nez Perce county when the property was attached in the case of Bank of Nezperce vs. Frank M. and Sarah E. Pindel; and with the exception of certain hogs and a stallion horse, sold under attachment under an order of the District Court, all of the rest of the property, including growing crops later harvested, the grain retained until spring together with the stock and sold on April 6th, was *held* by said sheriff from the time of the attachment until sale, and the proceeds then applied in conformity with the *terms of the writ of attachment,* in pay-

ment of the indebtedness less the costs in the case and fees of keeper and sheriff.

The construction given the statutes of our state authorizing the ex-sheriff instead of the incoming sheriff to sell that property will be discussed in Respondent's affirmative part of this brief. Having *begun* the execution of process by *taking and holding* all the property under attachment, the officer acquired a right to the property and assumed an obligation and duty which could only be performed by him, and in consideration of the existence of that duty no one had the right to take the property from him, whether sheriff or otherwise for the purpose of a sale by any other person than the ex-sheriff who had thus *commenced* the service of the *final process*. The cases cited on page 118 of Petitioner's brief have no application to this case, and with this brief statement of the situation, we pass at once to the consideration of our own part of the brief, calling attention to the principles that nothing occurring prior to judgment that could be set up in the original case in State Court can be urged in this bankruptcy case; that the judgment of Bank of Nezperce unappealed from, unreversed, absolute at the expiration of a year from its rendition, cannot be modified or changed thereafter and is subject to

no set-offs whatever—a complete and perefct determination of the rights of the parties to that litigation as to all matters plead therein, or that parties had a right to set up in their pleadings whether there set up or not; and that the sheriff who seized the property and was still holding it at the time of calling for the execution, was the only person who could properly receive it and sell the property.

We now pass to the affirmative part of Respondent's brief.

## RESPONDENT'S BRIES, POINTS AND AUTHORITIES.

### LAW OF THE CASE

Respondents, the Trustee in Bankruptcy of the estate of Frank M. Pindel and the claimant Bank of Nezperce, uniting in their brief, now call the Court's attention to the law and the principles applicable to the facts in this case. In passing, we cannot see how the Bankrupt's counsel expects this court to consider errors committed by the lower court without bringing to this court the record of the facts which were the basis of the court's decision in the lower court. We cannot see how he can expect this court to, nor can we see how this court can, determine that the

Honorable District Judge in his opinion in the case and his decision upon the points involved can be overruled and shown to be wrong in his decision of the points, and the Referee be adjudicated to be right, unless this Court has before it sufficient of the record to pass upon the points that were before the Referee and the Court. It will be noted in the Transcript of Record (p. 86) that there were 2050 folios of typewriting, some 453 pages of evidence, and the balance of 654 pages, copies of exhibits. Respondents will endeavor to keep within the Record supplied, and will furnish other parts of the record for the use of the Court, if the court will indicate, what it deems would be necessary to fully understand the contentions in this case.

## FIRST

The Trustee in Bankruptcy has shown by his return of sale that he has endeavored with all diligence to secure all of the property that belongs to the estate, and has used diligence in seeking to convert that property into money for the benefit of the Creditors. These are duties that devolve upon the Trustee and he has performed them faithfully and energetically. Delays, where there have been any, were

due to the improper interfering and the litigious disposition of the Bankrupt and his wife, particularly of the latter. Transcript of Record p. 43 lower half to line 10 p. 44. The Record shows that it has been almost impossible to get action on the part of the Referee, and here we wish to be courteous and considerate of this court officer; but at line 5 et seq. page 71 of the Transcript of Record appears a statement that is indicative of the situation, towit, "that affiant (Trustee) had been seeking to obtain for six months an order of sale of real estate prior to the date of said order of March 1, 1913." On same page it shows that the sale of the land occurred on April 5th, 1913, and that the return of sale was immediately made but, on account of the absence of the Referee from Idaho, the return of sale was not mailed to him until April 23, 1913, and no hearing was had thereon until the 14th day of June, 1913, on motion of the Trustee. (Transcript of Record, p. 19). The Trustee refers to the full record of the proceedings which he filed in reporting the sale of the real estate, showing the Petition for the order of sale (Trans. of Rec., p. 81), the order of the Referee directing a sale of real estate (p. 69) the return of sale, including the items and charges for which he claimed compensation (pages 73-81, inc.), and the Notice of Sale; co-

gether with the showing that the notice was published in the Nezperce Herald, a newspaper published at Nezperce, Lewis County, Idaho, showing that the sale was regularly made and fairly conducted, (Trans. of Rec., pages 70-72, inc.), and the proceedings passed upon by the court were found to be in accordance with the foregoing statement, the Court saying, at line 12, p. 48, Trans. of Rec.; "I have thus found that the sale was legally and fairly made," and states at page 46, line 25 and following, Trans. of Rec., what, in effect, the Referee had found (at p. 69, line 10 and following, in Order of Sale) that due notice was given as required by law, of the hearing of Trustee's petition for such order, and that at a meeting of creditors called for that purpose a majority of them, both in number and amount of their claims, appeared and voted in such meeting in December, 1910 in favor of the sale. And the Court further found, from the evidence before him, that "the Referee thus acquired jurisdiction to make the order. No creditor now appears to oppose confirmation, and eight out of the eleven whose claims were filed have, in writing, expressed their approval of the order. The three other claims are trivial in amount." Further, the Court says: "Even if we assume that Mrs. Pindel was entitled to notice, it is

to be observed that she originally appeared and in both this Court and in the Circuit Court of Appeals unsuccessfully opposed the sale." And this Court will further notice that, in the case of Bank of Nezperce vs. Pindel, 193 Fed. Rep., 917, bottom of page 922, the Court said:

> "We are also of the opinion that, by reason "of the court's authority touching the manner of "setting aside the homestead, it was empowered "to require the property to be sold in the "event that the exemptioner was unable or de"clined to pay the $4000 surplus into the estate. "On this phase of the controversy, therefore, we "hold that there was no error."

So, as stated by the Honorable District Judge in his order confirming the sale (Trans. of Rec., p. 45, line 24). "Now it is clear that by this order" (of District Judge of May 20th, 1911, affirmed by order of the Circuit Court of Appeals in above-named case) "no discretion was left either with the Trustee or the Referee touching the question of whether the property should be sold, provided a sale could be had, for an amount in excess of $5000. Only the details of the procedure—the time, and place, and manner of sale —were left to the sound discretion of the Referee." So we see when the court below finds as above, that the sale was legally made and fairly conducted, the order of confirmation of sale by the Honorable District Judge should be by this court affirmed.

## AS TO BANK OF NEZPERCE'S CLAIM.

*The claim of Bank of Nezperce rests upon a judgment.* The case was entitled "Bank of Nezperce, a Corporation, Plaintiff, vs. F. M. Pindel and Sarah E. Pindel, Defendants," and was heard in the District Court of the Second Judicial District of the State of Idaho, in and for Nez Perce County, upon pleadings duly framed and was presented to a jury of twelve men; plaintiff being represented by its counsel and the defendants by their counsel, and a verdict of the jury rendered after the hearing of the evidence of the witnesses for both plaintiff and defendant, argument of respective counsel and the instructions of the court, which verdict was in favor of the plaintiff and "against the defendants F. M. Pindel and Sarah E. Pindel in the sum of Three Thousand Six Hundred and Thirty-five and 16-100ths ($3635.16) Dollars." (Additional Transcript of Record, pages 4 to 6 inc.). The court in which this decison was rendered (District Court of the Second Judicial District of the State of Idaho in and for Nez Perce County) is a Court of Record, and such a judgment as a proposition of law.

(a). Is conclusive of all issues involved in the pleadings.

(b). Or that might have been litigated therein.

(c). Either by cross-complaint or counter-claim based upon "a cause of action arising out of the transaction set forth in the Complaint, set forth as the foundation of the plaintiff's claim or connected with the subject of the action."

Under these subdivisions:

(a). Section 4350, Revised Codes of Idaho, reads as follows: "A judgment is the *final* determination of the rights of the parties in an action or proceeding." Same as California Code of Civil Procedure, 3 Deering's Code, Sec. 577;

Kerr's California Codes, 577;

Bingham vs. Kearney, 136 Cal., 175; S. C. 68 Pac., 597;

Quirk vs. Rooney, 130 Cal. 525; 62 Pac., 825;

In re ~~Hendron~~ Harrington's Estate, 147 Cal., 124; S. C. 81 Pac., 546 at 548.

In Bingham vs. Kearney 136 Cal. 175; 68 Pacif. Rep. 597 at 598 the Court says (cited in re Harrington estate): "If she failed to assert her claim properly, or to present the proper evidence in the first suit, she will not now be permitted in a second to litigate it. The principles here stated are elementary." Quoting from Freeman on Judgments, in the same case (4th Ed., Sec. 260); "But if either party fails to present all his proofs, or improperly manages his case, or afterwards discovers additional evidence in

his behalf; or if the court finds contrary to the evidence or misapplies the law—in all these cases the judgment until corrected or vacated in some appropriate manner is as conclusive upon the parties as though it had settled the controversy in accordance with the principles of abstract justice."

So we see that, whatever may be claimed, even if there was something irregular, improperly decided or in any way contrary to what the Court should find, decided in the case, the Bankrupt and his wife are, under these principles of elementary law, *not entitled to re-litigate* that case in the Bankruptcy Court. And in *Quirk vs. Rooney* the Court (near bottom of second column, page 827), quoting from Vice-Chancellor Wigram in Henderson vs. Henderson (3 Hare, 115, and ppproved in the California court in Woolverton vs. Baker 98 Cal., 632 (33 Pacific 731): "The plea of res adjudicata applies, except in special cases, not only to points upon which the couht was not only actually required to form an opinion and pronounce a judgment, but to every point which properly belonged to every subject of litigation and which the *parties, exercising reosonable diligence, might have brought forward* at the time."

Futther, in *City of Aurora vs. West,* (7 Wall. 82, 19 L. Ed. 42), the rule is thus stated: But where every objection urged in the second suit was open to the party *within legistimate scope* of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed in rem judicatem and the former judgment in such case is conclusive between the parties."

(23 Cyc., page 1215).
Jones on Evidence, Sec. 585.

The conclusiveness of this judgment is best determined by the decisions of the State of Idaho in the case of *Elliott vs. Porter,* 6 Idaho, 684, (citing Marsh vs. Pier, 4 Rawle, 273; 26 Am. Dec., 131), as follows: "A judgment of a proper Court being a sentence or conclusion of the law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, *which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the Courts and juries, ever afterward, as long as it shall remain in force and unreversed."* And the Court adds in the same case: "A contrary doctrine, as it seems to me subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of the litigious

disposition on the part of suitors to the preservation of the public tranquility and happiness.'" "The judgment of the District Court is reversed, and the cause remanded, with instructions to enter judgment for defendant in the district court, costs of the appeal in favor of the appellant."

Cited as the law in Hilton vs. Stewart, 15 Idaho, 150 at 165. 96 Reaj. 577 at 583.

Having taken no appeal, the judgment stands conclusive between the parties on all questions raised in the pleadings, or that might have been raised in the pleadings. Further, questions as to damages from any loss of stock or other matters arising prior to judgment in the case must have been litigated in that case or they are, under the decisions of the Idaho Court, forever barred, as appeals from judgment in the State of Idaho must be taken within a year from the date of same. An appeal from the order allowing keeper's fees including the care of stock and crops the harvesting and hauling of the grain, must have been taken within sixty days from the date of rendition of the order; and an order with reference to costs which included amount ordered as keeper's fees must have been taken within sixty days from the filing of the order, or it becomes final. The statute (Sec. 4807

Revised Codes of Idaho, Subdivisions 1, first part, and 3) reads as follows:

*Time for Taking Appeals.*

*Sec.* 4807. An appeal may be taken to the Supreme Court, from a District Court:

1. From a *final judgment in an action* or special proceeding commenced in the court in which the same is rendered, within *one year* after the entry of judgment.

3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any *special order made after final judgment;* and from an interlocutory judgment in actions for partition of real property, within sixty days after the order or interlocutory judgment is made and entered on the minutes of the court, or filed with the clerk.

(c). The matters which could have been raised and decided in the case by cross-complaint or counterclaim, based upon a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action, must be litigated in this case of they are forever barred under the laws and decisions of the State of Idaho.

The matters pertaining to damages for claimed wrongful attachment must, under those laws and

decisions of the Idaho Supreme Court, be taken advantage of in the original action by cross-complaint or counter-claim.

Revised Codes of Idaho Sec. 4188; Rev. Codes of Idaho, Secs. 4183-4184, subdiv. 1; and Rev. Codes of Idaho Sec. 4185 read as follows:

*Affirmative Reliefs Cross Complaint.*

*Sec.* 4188. Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint.

*Contents of Answer.*

*Sec.* 4183. The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant.

2. A statement of any new matter constituting a defense or counter claim. If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant. If the

defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified a general denial is sufficient, but only puts in issue the material allegations of the complaint.

*Essentials of Counter Claim.*

*Sec.* 4184. The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action.

*Counter Claim Must Be Interposted.*

*Sec.* 4185. If the defendant omits to set up a counter claim in the cases mentioned in the first subdivision of the last section, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.

For *two* reasons any evidence as to damages for alleged wrongful attachment, value of property attached and all matters existing or arising therefrom up to the time of final judgment in the original action, was immaterial, irrelevant and incompetent for any

purpose connected with the case, and all points therein attempted to be made by argument by Petitioner's counsel can have no force and effect in this case.

*Firsts* All such are matters that could be litigated in the original action.

Quirk vs. Rooney, 130 Cal., 505; 62 Pac., 825 at 827;

*In re* Harrington Estate, 147 Cal., 124; 81 Pac. 546 at 548.

Bingham vs. Kearney, 136 Cal. 175; 68 Pac. 597 (2nd col.) and 598.

*Seconds* Must be brought in that action or are barred for not so bringing as a matter that could be litigated therein and *to avoid a multiplicity of suits.*

Willman vs. Friedman, 4 Idaho, 209; 38 Pac. 937.

In a case with like facts and citing Revised Statutes Sec. 4113; set out above decided December, 1894, the court, by Huston, Chief Justice, says: "The purpose of the Code is not only to simplify proceedings but to avoid as far as may be a multiplicity of suits." This case seems to determine the law in such cases, in Idaho, and at page 214 citing:

Bank vs. Morris, 13 Iowa, 136;

Reed vs. Chubb, 9 Iowa, 178;

Stadler vs. Parmlee, 10 Iowa 23;

Waugenheim vs. Graham, 39 Cal. 169, at 177 and 178.

(See also Stevens vs. Home Savings & Loan Assn., 5 Idaho 741, page 751, 51 Pac. 779). The Court by Huston, C. J., there says, (Referring to sections 4113 and 4188): "These and other provisions of our Codes were adopted to prevent a multiplicity of suits, "to the end that controversies that relate to one transaction should be settled in one instead of a multiplicity of suits."

Givens vs. Kenney, 7 Idaho, 335, bottom of 340-341. 63 Pac. 110.

The Court, by Quarles, J., says:

"Under our Code of Civil Procedure (Rev. "Stats. Secs. 4183-4185), the defendant, Givens, "was called upon, and it was his duty so to do, "to set up by way of cross-complaint or counter-"claim his said note and mortgage, and it have "his rights thereunder adjudicated."

Burke Land, Etc., Company vs. Wells Fargo & Co., 7 Idaho, 42, at bottom of page 55, Sullivan, J., says: 60 Pac. 87

"This court held in Stevens vs. Association, 5 "Idaho 741, 51 Pac., 779, that 'Sections 4183-"4185 of the Revised Statutes, inclusive, are in-"tended to prevent a multiplicity of suits, and to "settle all controversies and causes of action "between the parties which *arise out of, or are "connected with, the transaction upon which* "plaintiff's action is founded."

The court further says, (p. 56): Pac. R. 91

"Section 4353 of the Revised Statutes is as fol-"lows: 'The relief granted to the plaintiff, if "there be no answer, cannot exceed that which

"he shall have demanded in his complaint; but "in any other case, the court may grant him any "relief consistent with the case made by the "complaint and embraced within the issue.' Un- "der the provisions of that section, when an ans- "wer is filed, as was done in the case at bar, the "court may grant any relief consistent with the "case made by the complaint, and embraced "within the issues made, whether such relief be "prayed for or not." (Citing authorities). 'The "law of civil procedure in this state prohibits "the splitting up of causes of action and a multi- "plicity of suits."

There can be no question as to the interpretation of the statutes of this state by our Supreme Court, upon this subject, and this is conclusive of this proposition.

The Compiled Statutes of the United States, Sec. 914, provide:

"The practice, pleadings, and forms and "modes of proceeding in civil causes, other than "equity and adminalty causes in the circuit and "district courts, shall conform, as near as may "be, to the practice, pleadings, and forms and "modes of proceeding existing at the time in like "causes in the courts of record of the state with- "in which such circuit or district courts are held. "Any rule of court to the contrary notwithstand- "ing."

Freeport Water Co. v. Freeport, 180 U. S., 587, 45 L. Ed. 679, at page 687, Sec. column at top of page. Quoting from Burgess vs. Seligman, 107 U. S., 20-27, L. Ed., 359. In that case the court, by McKenna, J., says:

"Since the ordinary administration of the law "is carried on by the state courts, it necessarily "happens that by the course of their decisions "certain rules are established which become "rules of property and action in the state, "and have all the effect of law, and which it "would be wrong to disturb. This is especially "true with regard to the law of real estate and "the construction of state constitutions and "statutes. Such established rules are always "regarded by the federal courts, no less than by "the state courts themselves, as authoritative "declarations of what the law is." * * * * * * * *
"Acting on these principles, founded as they are "on cimity and good sense, the courts of the "United States, without sacrificing their own "dignity as independent tribunals, endeavor to "avoid, and in most cases do avoid any unseemly "conflict with the well considered decisions of "the state courts."

It has therefore become the imperative law of the United States Courts that they shall follow the constructions given by the highest court of the state to the statutes of that state.

In the case of Bank of Nezperce vs. Pindel et ux., 193 Fed. Rep. bottom of page 923, the Court will notice where it has already followed this rule explicitly, in there holding that it was controlled by the decision in the case of Thorne vs. Anderson, 7 Idaho, 421. 63 Pac. 572 This court is therefore held by these authorities in the construction of the statutes of the state of Idaho. That causes of action cannot be

split up and that all matters prior to the rendition of judgment, occurring in the case in the state court, must have been set up by cross-complaint or counter-claim and determined in that action; and if not so plead and determined, they are forever barred.

Further as between the parties to this action the judgment is conclusive and it cannot be attacked collaterally in this proceeding.

O'Neill vs. Potvin, 13 Idaho, 721. 93 Pac. 20.

So the assenting of Mrs. Pindel to make herself subject to the jurisdiction of the Bankruptcy Court part of the time, so as to offset her claimed personal property damages as against the claim of Bank of Nezperce against the Bankrupt's estate, looks very unreal from a judicial standpoint. Besides, jurisdiction cannot be conferred by consent of partiees.

It will be noticed in this connection that the meeting of the creditors for the authorization of sale of the real estate occurred before the intervention of Mrs. Pindel in the case, which was in December, 1909, (see Transcript of Record line 26 p. 16 and line 9, p. 69), and that claim of Bank of Nezperce was not filed until February 9, 1911. (Add'l Trans. of Rec. at pages 1-4, at 4.). So that claimant Bank of Nezperce is innocent of being among the claimants who were voting at that hearing. And it thus appears

there were other claimants against the Bankrupt who were then, and have been insisting on this estate being settled, in the way of selling the property and receiving their money. And it thus further apepars that the assertions against Bank of Nezperce are matters of prejudice and hatred by the Bankrupt of his greatest benefactor.

The judgment being conclusive of the claim of Bank of Nezperce, cannot be attacked either collaterally or directly in the Bankruptcy Court. It could not be attacked anywhere except by way of appeal or modification, all of which proceedings must be introduced in the court in which the judgment was rendered; and neither the judgment nor the order having been appealed from within the time limited by statute, the above matter is conclusively settled and the Bank's claim thus rests upon that which is the nearest to an absolute verity known to the law, to-wit, an unappealable judgment of a court of competent jurisdiction in which the case was regularly prosecuted and the judgment regularly entered, and the judgment includes damages, or the judgment proper, and the costs; and the costs include keeper's fees in the taking care of real and personal property, harvesting crops in this instance, conveying them to the warehouse, and keeping all property to day of

sale, upon which orders were made, as well as a specific order with reference to keeping of property, none of which were appealed from within the sixty days' limitation fixed by the statute. So it thus appears that the claim of the Bankrupt that there is any offset, any counter-claim, or any diminution of this judgment, is an unfounded as anything could possibly be in law. And we see that the statements of Bankrupt's counsel, unblushingly asserted in one place that he Bank of Nezperce has received property to more than pay its claim, in another place that it has destroyed property to more than pay its claim, are propositions that are absolutely unfounded and ordinarily would merit no attention in a court of law. We mention them, and ask the court's pardon for doing so, because the counsel has so persistently urged such statements in his brief.

We state further that there is no evidence that the Bank of Nezperce has received any property from the Bankrupt, or any money, or other consideration from the Bankrupt, except such as has been obtained from, first, sales under attachment and, secondly, from sales under execution. The $57 from sale of hogs, mentioned in one place as sold to Dan Morgan, (Transcript of Record p. 54 bottom and 55) was all accounted for in the return of the sheriff on sale of

property under execution. This is not in the report and would not be spoken of here, only that it might come into the mind of the court to know about it; and when the return on the execution was called for, to introduce into the evidence, it developed by the testimony that Mrs. Pindel was the last known to anyone to have the execution with the return in her possession, and that for a period of two weeks (Mr. or Mrs. Pindel testified) they had had the original suit papers out of the clerk's office, *at their farm,* for some two weeks and no execution with return was to be found. This is mentioned for this purpose: If the court insists upon knowing about that $57, the papers on which the return was based, counsel for Respondents believe, can now be produced and the sheriff can make a new return, should the Court deem it necessary and allow the necessary time and the proper order for the making of a new execution and return. All the sums from the sale of stock, under attachment, and grain and stock, under execution, are found by the Honorable District Judge in his decision herein, (Transcript of Record, line 25 p. 44, and line 28 p. 36 and line 18 p. 52).

It has been the purpose of the Bank of Nezperce to be absolutely fair with the Bankrupt and his estate. The Bank desires nothing but what belongs

to it, and never has been contended for anything but that.

## DAMAGES IMPOSSIBLE IN THE CASE.

We wish now to call the court's attention to the claim of damages claimed to be due the Bankrupt by reason of the dissolution of an attachment, by reason of any act of the sheriff in caring for or disposing of property. From what has been said it would appear that the attempting to make use of an attachment in securing an indebtedness due, would be a most risky, hazardous proceeding, and only those with unbounded means, or those very reckless without means would ever venture to ask for an attachment. We desire now to call the Court's attention to three propositions:

(a). Has the Bank of Nezperce, in suing out an attachment that has been dissolved, become liable to the Bankrupt and his wife, or either of them, for any damages whatever? If so, to what extent?

(b). Has the sheriff in attaching property, using ordinary care and diligence, produced liability for which the Bank of Nezperce is either liable or responsible? If he has wrongfully or oppressively levied his attachment, who is responsible for the results—the sheriff or Bank of Nezperce?

(c). Finally, what is the purpose of the statute in requiring a bond when an attachment or other process is sued out, and what purpose does such bond serve in the case?

We think the court is entitled to such assistance as counsel can give it on these points and thereby in a direct way answer without specifically touching upon each point, the peculiar ilne of argument indulged in by Bankrupt's counsel in discussing the liability of Bank of Nezperce; and will incidentally explain what the Bank of Nezperce would be responsible for in the event there had been litigation, or should the presenting of the claim to the Bankruptcy Court be considered as a litigation between it and the Pindels. The argument of Bankrupt's counsel on the various points that he has brought up has been such that it has been difficult to answer the separate propositions without too greatly extending the brief of Respondent.

*First, under* (*a*): Has the Bank of Nezperce, in suing out an attachment that has become dissolved, become liable to Frank M. and Sarah E. Pindel for any damage whatever?

Without waving what we have heretofore said, that any liability must be established by appearing in the same case by cross-complaint or counter-claim

and establishing a set-off in the original case, we call the Court's attention now to the *practicability* of using the attachment law and to the fact that Bank of Nezperce has *made reasonable use* of this attachment law; has never abandoned its right to that use; that, as soon as it was apparent that the first attachment would be dissolved, another attachment was immediately levied. And we will now show to the court, calling attention to statutes like our own, that the Bank of Nezperce is in no way liable for suing out a dissolved attachment in this case.

*In King vs. Montgomery* (50 Cal. 115) the principle involved in this case is set forth. The Court there lays down the rule that plaintiff is not liable for damages only in the event of *malicious* issuing of attachment. The Syllabus reads as follows:

> "*Damages for Suing out Attachment.*—In an "action for damages for maliciously suing out a "writ of attachment and causing the same to be "levied on the property of the plaintiff, the *com-* "*plaint must aver* that the writ was sued out "and prosecuted *without probable cause.*"
>
> "*Dismissal of Action.*—When a cause is called "for trial the action may be dismissed on motion "of the defendant if the plaintiff decclines to ament."

The decision by the court (Niles, J.,), adds:

> "The complaint contained no averment that "the action against Dobbs and King was com- "menced, or the writ of attachment sued out and "executed *without probable cause.* In this the

"complaint was clearly insufficient and the "plaintiff declined to amend. The motion to "dismiss was properly granted. Judgment af- "firmed."

There has been no evidence in this case that Bank of Nezperce was without *probable cause* in commencing this action, and in suing out the attachments. The action was prosecuted with due diligence and the judgment obtained. We will show that this *established probable cause* and that a *lack* of probable cause could not *possibly have existed* in this case. The following authorities maintain the rule above stated, to-wit, that there can be no damages claimed except where the party suing for damages pleads and establishes lack of probable cause in commencing the action and in the suing out of the attachment, or any other writ in which a bond or undertaking is required by law. In passing, we will say the same rule applies to injunction cases as to cases in which an attachment is issued, and the authorities can be used interchangeably under those two heads:

Cary vs. Gunnison, 51 Iowa 202; 1 N. W. 510.

Lindsey vs. Larned, 17 Mass. 196 (Quoted from later).

Hess vs. German Baking Company, 27 Ore. 299; 60 Pac. 1011.

10 Encyc. of Pleading and Practice, 1118.

Burton vs. Railway Co. 33 Minn. 193; 22 N. W. 300.

Preston vs. Cooper, 1 Dill. 589; Fed. Case No. 11395.

Stewart vs. Sonneborn, 98 U. S. 187. ( Quoted from later). 25 L. Ed. 116

Clossen vs. Staples, 42 Vt. 209.

Palmer vs. Foley, 71 N. Y. 106.

Butcher's Union, Etc. Co. vs. Howell, 37 La. Ann. 280.

Eakle vs. Smith, 27 Md. 467.

Smith vs. Gregg, 9 Neb. 212. 2 N.W. 459

Cox vs. Taylor, 10 B. Mon., 17; 20-21.

Asevado vs. Orr, 100 Cal. 293, at 297, (Citing 34 Pac. 777).

Manlove vs. Vick, 55 Miss. 567. (Quoted from later).

Hayden vs. Keith, 32 Minn. 237. 20 N.W. 195;

Burnett vs. Nicholson, 79 N. C. 548-552.

Lawton vs. Green, 64 N. Y. at 330.

Robinson vs. Kellum, 6 Cal. 399. (Quoted from later).

Keeber vs. Mercantile Bank, 4 Mo. App. 195.

Grant vs. Moore, 29 Cal. 644, 649, and 656.

Bulkley vs. Smith, 2 Duer 274.

Collins vs. Shannon, (Wis.) 30 N. W. 730.

Doyle vs. City of Sandpoint, 18 Ida. 654; 112 Pac. 204.

In *Robinson vs. Kellum,* 6 Cal., 399, the Syllabus reads:

> "An action in the case will not lie, for improp-
> "erly suing out an injunction, unless it is charg-
> "ed in the declaration as an abuse of the pro-
> "cess of court, through malice and without prob-
> "able cause."

The decision is a little more extended than the Syllabus and sustains it, absolutely.

In *Asevado vs. Orr,* 100 Cal. at p. 297, the court, (citing Robinson vs. Kellum), says:

> "The courts of the state are open to every liti-
> "gant for the redress of his wrongs and, unless
> "he is at liberty to seek such redress without
> "rendering himself liable in damages to the de-
> "fendant, in case he shall fail to establish his
> "complaint this right would, in many instances,
> "be a barren privilege. * * * * * * It is only when
> "the process of the court is abused, or when the
> "plaintiff seeks to avail himself of his power to
> "harass or injure another by suing him upon a
> "charge of *which he is conscious of having no*
> "*right of action,* that he becomes *amenable in*
> "*damages for bringing such suit.* Such an ac-
> "tion, however, is in the nature of a malicious
> "prosecution, and in any action to recover dam-
> "ages, therefor, want of probable cause, and
> "malice, are essential ingredients to the com-
> "plaint, and must be clearly alleged and proved
> "in order to sustain the action." Citing Cox vs.
> "Taylor 10 B. Mon. 17 supra. Also citing p. 298
> "that voluntarily dismissing of the action by
> "the plaintiff was not admission that he had no
> "probable cause in commencing the action."

In *Hess vs. German Baking Company*, 27 Ore. 299; 60 Pac., 1011, the court, by Bean, J., says:

> "It is an elementary rule of law that *no action "can be maintained for an injury caused by legal "proceedings, except* the process of the court is "abused through *malice* and *without probable "cause.* The *established remedies are open to "every litigant, without penalty,* except costs "and such damages as are incident to the remedy "chosen, unless they are resorted to for the pur- "pose of harassing or injuring the defendant."

In this case the judge quotes from Chalmers, J., in *Manlove vs. Vick*, in 55 Miss., 567, as follows:

> "It is well settled," says Chalmers, J., in "Manlove v. Vick, (55 Miss. 567), "Both at com- "mon law and under *statutory provisions requir- "ing* the *giving* of *bonds as conditions precedent "to obtaining certain statutory writs*, that no "action can be maintained against the party is- "suing the writs except by showing *malice and "want of probable cause* in their *issuance.*"

In *Stewart vs. Sonneborn*, 98 U. S., 187; 25 L. Ed. p. 116 at 119, the court, by Justice Strong, in the 1st par. of the 1st col. of said page 119, quoting from in *Farmer vs. Darling*, lays down the rule in United States Court on this matter; and at 2nd col. of the same page the court says:

> "In every case of an action for a malicious "prosecution or suit, *it must be averred and "proved that* the *proceeding* instituted against "the plaintiff has failed; but its failure has "never been held to be *evidence of either malice*

*"or want of probable cause for its institution;*
*"much less that it is conclusive of those things."*

In the case of Bank of Nezperce vs. Frank M. and Sarah E. Pindel the plaintiff was awarded judgment for $3536.16. This, under the foregoing United States Court authority and other authoritines above cited, is conclusive of probable cause.

We do not think it necessary to cite further authirities or further discuss this matter; but, in passing, suggest that he claim for damages against Bank of Nezperce by reason of the first attachment having been dissolved, or by reason of the issuing of the second attachment, is entirely unfounded. So that the wordy abuse of the honorable lower court, of the Trustee in Bankruptcy, and of the claimant Bank of Nezperce, is not very material in this case.

Further, if the Pindels could possibly have any action as claimed by their counsel, an action for lamages or otherwise, it must have been by a suit upon the attachment bond and our Supreme Court has anticipated, as we have seen, the Pindels and their counsel, somewhat, in holding that if they have any claim for damages by reason of attachment, they must make good their claim through cross-complaint or counter-claim, as the judgment in the case is *res adjudicata of all such matters.* And we here cite one other authority to show how these contests

by a debtor against creditor, *without paying the demand,* is looked upon by at least one court. In *Lindsey vs. Larned,* 17 Mass., 189, at p. 196, the court by Putnam, J., says:

> "In the case at bar, no malice is imputed to "the defendant, attachment plaintiff. Anxious "to recover a considerable debt, he took the meas- "ures, and those only, which under the best ad- "vice he supposed adapted to that purpose, "without any apparent desire to harass or vex "his debtor. Undoubtedly the present plaintiff "has sustained considerable loss in consequence "of the suits which the defendant instituted, *but "it must not be forgotten,* in this part of the "case, that the *defendant has never,* to this day, *"obtained payment of his debt, notwithstanding "all his exertions,* * * * * * But we go upon the "ground that *malice* on the part of the defendant "is a necessary ingredient in an action of this "nature, and that it is *lawful* for any man *to "enforce his supposed rights by any lawful pro- "cess.* * * * * * * The opinion of the court is that "the non-suit must stand."

(b). *Has the sheriff, in attaching property and using ordinary care and diligence, produced liability for which the Bank of Nezperce is either liable or responsible? If he has wrongfully or oppressively levied his attachment, who is responsible for the results, the sheriff, or Bank of Nezperce?*

The sheriff is serving process and properly handling same incurs no liability. If he were liable for properly executing process, the office of sheriff would

never be taken by any responsible person. If the sheriff should not be liable, of course the Bank of Nezperce should not be liable where the sheriff uses ordinary care and diligence. If he has *wrongfully or oppressively levied an attachment,* certainly no one is responsible for that, or any acts except himself. If he has not properly cared for property attached, he, *only,* is responsible and his responsibility can be enforced upon his official bond, not upon the litigant. The plaintiff in attachment has nothing to say about, nor is he amenable to any law for the manner in which the sheriff exercises the functions of his office. In *Blanchard vs.* ~~Green~~ Brown, 42 Mich., 3 N. W. Rep. 246, the court says, at p. 248:

> "The property, after levy, was under *control* "of the *officers,* and *not of the plaintiff in at-* "*tachment,* to see to the enforcement of the or- "der of restoration which he had procured."
>
> "Further: *"There was no evidence that "Brown was responsible for anything but suing "out the attachment,* and *no evidence that this "was wrongful."*

Gardner vs. Donnelly 86 Cal. 367, bottom 371.

On the dissolution of the attachment the sheriff, only, is liable for not obeying the orders of the court, if there was any liability for any failure to obey.

So it would seem, from the foregoing authorities, that it is impossible to show that Bank of Nezperce

commenced its action without probable cause, as it recovered judgment for $3536.16 on the verdict of the jury, making it impossible to show that the writ was sued out or prosecuted without probable cause; and it is therefore not possible that the Bank of Nezperce is in any way liable to Mr. and Mrs. Pindel, or either of them, under the attachment. And, further, under the foregoing principles and authorities, they are not liable in any way for any action of the sheriff. If his acts were not proper (and there is nothing to show that they have not been) their only action was upon his official bond, and Bank of Nezperce was not a surety upon that bond, or upon either bond for attachment.

Finally, (c).—What is the purpose of the statute in requiring a bond when an attachment or other court process is sued out; and what purpose does a bond serve in the case?

The purpose of the statute in requiring a bond in the case of an attachment, or of an injunction, is determined by the statute requiring it. And when a plaintiff furnishes a bond, or when an undertaking is furnished by the plaintiff, the plaintiff in the case of the bond, and the sureties in the case of the undertaking, are bond by the terms contained in the bond or in the undertaking. In this state the statu-

tory condition of the bond or undertaking is that *if the defendant recover judgment,* or if the attachment be wrongfully issued, the plaintiff will pay all the costs that man be *awarded* to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Revised Codes of Idaho Undertaking Publication of Notice:

> "Sec. 4304. Before issuing the writ the clerk "must require a written undertaking on the part "of the plaintiff, in a sum not less than two hun- "dred dollars, and not exceeding the amount "claimed by the plaintiff, with sufficient sure- "ties, to the effect that, if the defendant recover "judgment, or if the attachment be wrongfully "issued, the plaintiff will pay all costs that may "be awarded to the defendant, and all damages "which he may sustain by reason of the attach- "ment not exceeding the sum specified in the "undertaking."

In the first place, the defendants never recovered judgment in the case. No liability arose there. The first attachment, issued June 27, 1908, was dissolved by reason of a defect in the undertaking. A new attachment was levied on August 14, 1908. On the order dissolving the attachment August 13, 1908, the liability under that attachment undertaking was ended as to the time during which the sureties were responsible. There was no demand arising during

that time. There is no claim that the property was not all in the hands of the sheriff upon the levying of the second attachment. There is no evidence whatever of any *damages* by reason of the *first attachment,* from date of its levy to its dissolution.

Further, there never have been any *costs awarded* to defendants in any way, particularly by the only way that such costs can be awarded—a suit on the attachment bond. Consequently there is no set-off on this line. Moreover, in such a suit, unless waived, the parties would be entitled to a jury trial under pleadings properly indicating the issues involved.

Stewart vs. Sonneborn 98 U. S. 187, 25 L. Ed. p. 116 cited above.

Any action on the bond is long since, by the statute of limitations, barred, under various sections of our statutes, heretofore set out. Sec. 4054, subdivisions 2 and 3. Sec. 4055, subdiv. 1. So there is no liability of Bank of Nezperce under either attachment, and no damages or costs have been awarded or will be awarded. Only an Idaho state court would be clothed with jurisdiction to consider such cause or award damages—there can be no costs.

Only the sureties on the undertaking are liable, in any event. Bank of Nezperce has signed no undertaking for either attachment, as before stated. Those

only who signed the attachment undertakings or undertaking are responsible thereon, and they would be bound under the terms of the *written* undertaking, only. So the Pindels have not come in touching distance at to Bank of Nezperce, in their attack in the Bankruptcy court upon its claim. In McDonald vs. Fett, 49 Cal., 354, the court by Nilis, J., says:

> "By the act of signing an attachment bond "the surety does not become a participant in the "seizure or detention of the attached property "by the sheriff, or liable as a trespasser for such "acts. His *liability arises* under his contract, "merely, and is limited by its terms and condi- "tions.
>
> "In *Carter vs. Multrein,* 82 Cal., 167, at p. 169, 22 Pac. 1086. "the court by McFarland, J., says: 'A surety "has a right to stand on the prices and terms of "his contract; he can be held to no other or dif- "ferent contract.' " Citing People vs. Buster 11 "Cal. 220 * * * * * * * * * "'If there is any "principle of law well settled it is that the lia- "bility of sureties is not to be extended beyond "the terms of their contract.' "

And we wish to say that we do not cite these authorities or this principle for the purpose of suggesting or proposing the avoidance of any liability on the part of Bank of Nezperce for anything for which it is legally responsible, but for the purpose of showing the court that in this matter of claiming an offset against the Bank of Nezperce on its claim presented

against the Bankrupt, they have *no ground* to go on in *claiming any off-set whatever.* The Honorable District Court has found just what the Bank of Nezperce is entitled to and it is immaterial what the Bankrupt and his wife claim, or what the Honorable Referee in Bankruptcy, in this case, has found in their favor. The finding is simply not law, and His Honor the District Judge must be sustained in his findings and in the law which he has advanced in this case with reference to any offset to the claim of Bank of Nezperce on the basis of anything occurring with reference to the attachment or as to any off-set that might be plead against the claim of Bank of Nezperce resting as it does upon a valid judgment.

## THE OFFICER WHO ATTACHED AND HELD THE PROPERTY THE ONLY ONE TO SELL.

The officer who levied the attachment was Harry Lydon. It is conceded he was the duly elected, qualified and acting sheriff of Nez Perce county at the time of the issuing and the levying of the attachment in the case of Bank of Nezperce vs. Frank M. and Sarah E. Pindel in the State Court. Under Sec. 4307 Revised Stateutes, Subdiv. 3, which reads as follows: *Execution of Writ*:

> *Sec.* 4307...The sheriff to whom the writ is directed and delivered, must execute the same

without delay, and if the undertaking mentioned in Sec. 4305 be not given, as follows: * * * * *

3. Personal property, capable of manual delivery, must be attached by taking it into custody. * * * * *

Mr. Freeman on Executions, 1st Ed. at Sec. 291, line 4, p. 485, says: "The officer who commences must usually complete the execution of the writ." (This means any writ by which a levy is made.) Mr. Freeman further says:

> "His term of office may expire after the levy "and before the sale. This does not terminate "his authority, nor even confer upon his succes- "sor power to make the sale if the venditioni "ex'ponas should be *directed to him.* By the "levy of the writ upon chattels, the officer ac- "quires a special property therein. This prop- "erty continues after his removal from office, or "even after his death." * * * * * * "an officer hav- "ing commenced to execute a writ must complete "it, and cannot release himself from this duty by "handing the writ over to his successor."

There is no claim whatever that the proceeds of the property on sale by said Harry Lydon were not paid over for the satisfaction of the judgment obtained after the attachment. There is no claim whatever that Harry Lydon was not the person who had levied the attachment upon the property and was *still holding it as sheriff* at the time of the expiration of his term of office as sheriff and time of the sale April 6, 1909.

The Statutes of this State provide (Sec. 2045) what the former sheriff shall deliver to his successor, which statute reads as follows:

"*Delivery of Property to Successor.*

> *Sec.* 2045. Within three days after the service of the certificate upon the former sheriff, he "must deliver to his successor * * * * * *
>
> 5. All executions, *attachments* and final process, except those which he has executed or *has begun* to execute, by the collection of money or a *levy on property.*"

The record shows that Harry Lydon had attached the property under the second writ of attachment, and was holding the same at the time of judgment rendered in the case, February 15, 1909. It was the duty of the sheriff to still hold this property until such time as the same should be disposed of, *after judgment* for the plaintiff, until the same, or proceeds thereof, should be disposed of for the purpose of or in paying the debt, in whole or in part, upon which judgment was obtained.

It is not the policy of the law that, when an officer is holding property, as this was being held, and other officer, his successor, or other officer, shall interfere with his possession. He is to complete the handling of the property. When he has *completed* the process which he has *commenced* to execute in the *levying* of the attachment, he returns it into the court. Hence

Harry Lydon received this writ of execution; he was still holding the property and liable for it or its proceeds after sale under execution, on his official bond —liable for its safe keeping and for the proceeds being applied in satisfaction of the judgment.

Incidentally we will here suggest, Mr. and Mrs. Pindel are estopped from claiming any damage resulting from a sale of the property by Harry Lydon for the following reasons: Mrs. Pindel participated in the execution sale without any protest upon that point, allowing the officer to take a position which, according to their theory and he holding the same, would be different had they mentioned their objection in advance. By participating in that sale they have therefore admitted that the officer was the proper officer to make the sale and that the sale was regular. And,

*Secondly*: The Bankrupt and his wife having permitted the time for commencing any action, either by themselves or the Trustee, against the sheriff Harry Lydon, to pass. they are guilty of laches and, as held by the court, have done away with the opportunity of the Trustee to take any steps to protect the estate, allowing the time to pass beyond the limit set by the Statute of Limitations for commencing an action against Harry Lydon both in his individual and of-

ficial capacity. (Transcript of Record line 21 p. 41 and 42.

However, the *claim* of damages for the reason that Harry Lydon was not, *at* the *time of the sale, sheriff of Nez Perce County,* is not well founded. A sale by him would, in any event, yield the same amount of money, other things being equal, that a sale by the incoming sheriff would have yielded. But Mr. Lydon had the right to receive the execution, was the only one authorized to receive it; he had the right to sell the property and, under our statutes, was the only person authorized to act in that matter. He was the officer de facto in making the sale.

Section 4305, Revised Codes, reads as follows:

> "Section 4305. The writ must be directed to "the sheriff of any county in which property of "such defendant may be, and must *require him "to attach* and *safely keep* all the property of "such defendant, within his county, not exempt "from execution, or *so much thereof as may be "sufficient* to *satisfy* the *plaintiff's demand,* the "amount of which must be stated in conformity "with the complaint, unless the defendant give "him security by the undertaking of at least two "sufficient sureties, in an amount sufficient to "satisfy such demand, besides costs, or in an "amount equal to the value of the property "which has been, or is about to be attached; in "which case, to take such undertaking." * * * * *

This section provides that the writ must be directed to the sheriff of the county, (Harry Lydon

was *then* the *sheriff*), must require him to *attach* and *safely keep* all the property of such defendant within his county not exempt from execution—sufficient of it to satisfy the plaintiff's demand. That if the action proceeds will be determined by the amount of the judgment.

Section 4312, Revised Codes, reads as follows:

> *"Sale of Perishable Property: Collection of Debts."*
>
> "Sec. 4312. If any of the property attached be "*perishable*, the sheriff must *sell* the same in the "*manner* in which *such property* is *sold on exe-* "*cution.* The *proceeds and other property at-* "*tached* by him *must be retained by him* to *ans-* "*wer any judgment that may* be *rendered in the* "*action.*" * * * * * * * * * *

The attachment becomes an execution in effect in the event, a mere incident, of the property being "perishable."

Section 4315, Revised Codes, reads as follows:

> *"Sale of Attached Property to Satisfy Judgment."*
>
> "Sec. 4315. If *judgment* be *recovered* by the "*plaintiff*, the *sheriff must satisfy* the same *out* "of the *property attached* by *him* which has not "been delivered to the defendant, or a claimant "as hereinbefore provided, or subjected to exe- "cution on *another judgment recovered previous* "to the *issuing* of the *attachment*, if it be suffi- "cient for that purpose."
>
> "1. By paying to the plaintiff the proceeds "of all sales of perishable property sold by him. "* * * * * * * * * *"

"2. If any balance remain due, and an *execu-*
*"tion shall have been issued* on *the judgment, he*
*"must sell, under the execution,* so much of the
"property, real or personal as may be necessary
"to satisfy the balance, if enough for that pur-
"pose remain in his hands." * * * * * * * * *.

Notice: Subdivision 2 of this Section provides that "if any balance shall remain due *and an execution shall have been issued on the judgment"* (Note, this is upon the judgment, not to the sheriff of the county), *"He* the sheriff who attached must sell under the (that) execution so much of the property, real or personal, as may be necessary to satisfy the balance."

These sections are to be constructed together, and there is also to be construed with them Sec. 2045, Rev. Statutes, subdiv. 5, set out above.

Subdivision 5 of Sec. 2045 provides that "All executions, attachments, and final process he must deliver to his successor, except those which he has executed or *has begun to execute,* by the collection of money or the *levy on property."* The sheriff Harry Lydon had levied the attachment during his term of office. The judgment was obtained on the 15th of February, 1909. (Additional Transcript of Record, pages 4 tnd 5) after his term of office as sheriff had expired. The *writ* commanded him to *attach* and *safely keep* the *property to satisfy* the *plaintiff's de-*

*mand.* By Section 4312 (copy on proceeding page) he is to keep the balance *after sale of perishable property* to *answer any judgment* except taken on execution on judgment obtained before issuing of attachment. In passing, this is the only instance in which the property levied upon by the sheriff can be meddled with while in his hands, and this must be by execution upon a judgment obtained before the attachment issued; and, according to Sec. 4315, the sheriff must satisfy the same (the judgment in which the attachment was issued to him) out of the property attached, except it has been delivered to the defendant or a claimant, or subjected to the execution on another judgment recovered previous to the *issuing of* the attachment. The *expression* of these instances excludes all others in accordance with a general well known principle of the law, "expressio unius exclusio alteris."

The *incoming* sheriff has no right to *take* this property, held under attachment by his prececessor. He has no right to *receive* an execution *issued on the judgment* and *take* it under such execution *from* his predecessor. Only in one instance can the property be *taken away from him under these sections,* that is upon execution in another judgment *recovered previous to the issuing* of the attachment under which

Mr. Lydon was holding the property. And if a further execution is issued after he, as ex-sheriff, has paid out what money he has in his hands, he must *sell* any *attached property* he holds "if enough for that purpose remain in his hands." The incoming sheriff has no right to take away from, intermeddle with, or touch any property that his *predecessor while sheriff* has *levied an attachment upon* and *is still holding.*

It is clear the provisions of our statutes are designed to prevent difficulties and encounters between the ex-sheriff and the incoming sheriff. The reference in Sec. 2045 excepting those which he has *executed* or *begun to execute* includes not only an *attachment* long before issued, but also any *execution* that may be thereafter executed in carrying out the purposes for which the attachment was issued, if he had begun to execute it by levying upon property.

In *Sageley vs. Livermore,* 45 Cal. 613, at 614, the Court, by Wallace, C. J., says:

> "The writ of attachment issued in the action "of Livermore vs. Stine commanded the sheriff "to attach and safely keep the property of the defendant in that action or so much as might be sufficient to satisfy the demand of the plaintiffs. "This writ had come to the hand of the plaintiff here, while he was yet holding the office of sher-

"iff. He had partly executed it by seizing cer-
"tain property, and had *begun* to *execute* that
"portion of its command which required him to
safely keep the property. In this condition of
"things the plaintiff's term of office, as sheriff,
"expired, and the first question made is, wheth-
"er it was his duty to turn over the attached
property to his successor in office."

"This question is to be determined by refer-
"ence to the provisions of the act concerning
"sheriffs. (Hitt. G. L., Sec. 6849 et seq.), It is
"provided by this statute (Sec. 6885, Subdivision
5), (see Sec. 2045, Subdivision 5, Idaho Rev.
Codes) that the outgowing shall turn over to the
"incoming sheriff 'all executions, attachments,
"and final process *except* those which he has exe-
"cuted or has begun to execute by the collection
"of money or a levy on property.' A writ of at-
"tachment in his hands and under which nothing
"whatever has been done is to be turned over of
"course. But if the writ has been executed or if
"the outgoing officer has already begun its exe-
"cution, it falls within the express exception
"found in the statute, and is, therefore, not to be
turned over to the new incumbent. The Act no-
"where provides that property held under a levy
"of a writ of atachment is to be surrendered to
"the new sheriff, the only provision as to turn-
"ing over *property as such* is found in the first
"subdivision of that section of the act just re-
"ferred to, and the property there mentioned is
" 'the property *of the county*' in the hands of the
"retiring officer. We cannot, in the absence of
an express provision of the statute, deduce from
the statute any duty to turn over to the new in-
"cumbent property held under a writ of attach-
"ment, for whenever property is so held by an
"outgoing sheriff, it must be because he has exe-
"cuted the writ so far as making seizure of the

"property, and *has begun to execute it by keep-*
*"ing the property in his possession*, pursuant to
"the *command of the writ,* in either of which
"cases it seems to be the intent of the Act that
"the officer commencing to execute process shall
"complete it, notwithstanding a change of the in-
"cumbency."

In *Perrin vs. McMann,* 97 Cal., 52; 31 Pac. 837, the ex-sheriff was notified to release attached property held after his term as sheriff had expired. He refused, and was sued for $5000 damages. Judgment was given for the defendant, the ex-sheriff, which was affirmed on appeal for the reason that the party to whom the property had been released was applying to the incoming sheriff for such release, while the outgoing or ex-sheriff was the one who had levied upon the property, and therefore had it in his custody and under his control.

In *People vs. Kendall,* 14 Col. App., 180; 59 Pac. 409 at 410 (top of Sec. Col.), Bissell, P. J., says:

" * * * It is likewise true that the sheriff to
"whom the process is issued continues as the of-
"ficer, for the purposes of the execution of the
"writ, even after the expiration of his term of
"service and the appointment or election of his
"successor. Under the ancient law—and this is
"still the rule in the absence of a statute—
"when an *execution* or *attachment* was placed
"in the hands of an officer for service, and he
"commenced the service, he continued its execu-
"tion to the end, made sales of the property
"thereunder, collected the money, and was re-

"sponsible to the execution plaintiff for the pro-
"ceeds. It made no difference whether he re-
"mained in office, or went out of it; whether he
"was succeeded by another, or succeeded himself.
"The result in all cases was precisely the same.
"This rule has in no measure been modified by
"our statute, but the statute in reality is declar-
"ative of the provisions of the common law re-
"specting the duties and liabilities of officers.
"The sheriff going out of office is given express
"authority and is directed by statute to proceed
"with his execution as if his term had not ex-
"pired, and the sureties on his bond are made
"liable for any omission of his duty in executing
"it, to the same extent as though the duty had
"been performed during his term. Gen. St. 1883,
"Sec. 603. This general doctrine is supported
"by a great many cases, a few of which only,
"shall we cite. * * * * * * * *"

In *Landsdon vs. Washington County,* 16 Ida., 618, bottom of 624 and 625, the Idaho Supreme Court held that the sheriff of a county has the implied authority enabling him to carry out his granted authority. This case, while not applying to one like the case at bar, indicates that the Supreme Court of this state would hold that the authority given by the sections of the statute cited, to hold property, applies to the satisfaction of any judgment that might be obtained, would include all the authority which we claim herein; and these sections of our statute are conclusive on this point and no one but the sheriff who had commenced the serving of the writ of at-

tachment and the levying upon property and holding it, could have any authority to receive the execution or sell the property.

In passing *we* will say that the old statutes of California and statutes of Colorado upon the subject of attachments and the duties of the sheriff thereunder, and of the outgoing sheriff, are like our own statutes herein referred to; and in confirmation of this point, with reference to the old California statute from which ours is copied, the case of *Wood vs. Lowden* 117 Cal. 235, 49 Pac. 132 shows that the statute of the state of California was changed bv statutory enactment making it possible for the new or incoming sheriff to perform certain duties mentioned in the new statute.

The provisions of the Idaho Statute as to the delivery of process to the sheriff's successor in office and the completion of process that the ex-sheriff has executed, or *begun to execute* by the *collection* of mon*ey,* or a *levy* on *property* appears to be the common law on that subject, and requires legislation to change the same.

Freeman on Judgments 1st Ed. Sec. 327 first sentence and line 14 et seq. following page.

People vs. Boring, 8 Cal. 406, Decision by Field, J.

This case was decided in 1857 prior to adoption of any Idaho statute (Territory organized 1863) making the rule of decision in that case rule of interpretation of statute in this state, see also

Anthony vs. Wessel, 9 Cal. 103, decided in 1858.

People vs. Kendall 14 Colo. 180, cited above.

Revised Codes of Idaho Sec. 4490a re-enacting Sec. 1, page 20 Laws of 1895 reads as follows:

> *"Execution of Deed by Successor in Office."*
> "Sec. 4490a. When the sheriff who has sold "any real estate shall die, resign, be removed "from office, or his term of office expire, be- "fore executing any good and sufficient deed for "such real estate. such deed may be executed by "the successor in office of such sheriff with the "same effect to all intents and purposes as if "made by the sheriff making the sale."

The California and Idaho statutes, it will be noticed, are *directed to and deal with property* in the hands of the ex-sheriff; so that the authorities and the argument of counsel have no application to this case, by reason of the difference in view taken by the legislature, of what the sheriff should and should not do on the expiration of the term of his office.

We thus see that the Bankrupt and wife were:

*First*: Conclusively bound by the judgment as against any damages arising from the attachments

by not suing for such damages by counter-claim or cross-complaint in the original action;

*Second*: That the ex-sheriff Harry Lydon was the only person to, and was fully authorized to receive and levy execution and to sell every article or all the property he held under attachment. If follows, then, that the Bankrupt and wife or either of them, have no claim whatever arising from *any levy* upon or *sale* of property of Bankrupt and wife, or either of them, and that they have nothing to offset on those grounds against the claim of Bank of Nezperce.

This, we believe, covers all the ground and all the points that have been validly urged in this case with reference to the reversal of the decision of the Honorable District Judge in this cause; and, while not specifically touching each and all points separately, set forth by the Bankrupt's counsel, it has been the Respondents purpose to touch upon and answer every point involved in the case and to show that many other points having nothing whatever to do with the case, but by reason of their being injected into the case, are fully answered.

The order confirming the sale of real estate is valid. legal and just. By the sale the purchaser acquired an interest in the land and it should be awarded him by the court.

Respondent's general contention is,

*First*: That the Bankrupt has brought no record to this court showing any ground whatever for reversing the decision of the Honorable District Court of Idaho in any particular in his decision in effect reversing the decision of the Referee in this cause; and,

*Secondly*: The Bankrupt has shown no ground for revising in points of law of said decision of the Honorable District Judge.

Respondents respectfully submit this cause for the consideration and decision of the Honorable United States Circuit Court of Appeals, Ninth Circuit.

Respectfully submitted,

Chris Bentley

Attorney for the Trustee Norman J. Holgate;

Eugene O'Neill

Attorney for Claimant Bank of Nezperce.